(13)

No. 94-923-ATX
Status: GRANTED

Title: Ruth O. Shaw, et al., Appellants
v.
James B. Hunt, Jr.., Governor of North Carolina, et al.

Docketed:
November 21, 1994

Court: United States District Court for the Eastern District of North Carolina

Vide:
94-924

Counsel for appellant: Everett,Robinson O.

Counsel for appellee: Easley,Michael, Farr,Thomas A., Jones,Elaine R., Solicitor General, Hodgkiss,Anita S.

10-13-94 ext til 11-21-94, C.J., CITED. 40 copies ea juris. statement & sep appdx. N/A filed 8-29-94.

Entry	Date	Note	Proceedings and Orders
1	Oct 11 1994	G	Application (A94-253) to extend the time to file a jurisdictional statement on appeal from November 14, 1994 to November 21, 1994, submitted to The Chief Justice.
2	Oct 13 1994		Application (A94-253) granted by the Chief Justice extending the time to file until November 21, 1994.
3	Nov 21 1994	G	Statement as to jurisdiction filed.
4	Nov 21 1994		Appendix of appellant Ruth Shaw, et al. filed.
6	Dec 14 1994		Order extending time to file response to jurisdictional statement until December 30, 1994.
7	Dec 27 1994		Motion of appellees James B. Hunt, et al. to affirm filed. VIDED.
10	Dec 28 1994		DISTRIBUTED. January 13, 1995 (Page 1)
8	Dec 30 1994		Motion of appellees Ralph Gingles, et al. to dismiss or affirm filed. VIDED.
9	Jan 9 1995		Brief of appellants in opposition to appellees' motions to dismiss or affirm filed.
11	Jun 26 1995		REDISTRIBUTED. June 29, 1995 (Page 1)
12	Jun 29 1995		PROBABLE JURISDICTION NOTED.
			**********
14	Aug 7 1995		Order extending time to file brief of appellant on the merits until September 13, 1995.
15	Aug 11 1995		Brief amicus curiae of Pacific Legal Foundation filed. VIDED.
17	Aug 25 1995		Record filed.
		*	Original record proceedings United States District Court for the Eastern District of North Carolina (4 BOXES)
16	Aug 29 1995		Order further extending time to file brief of appellant on the merits until September 22, 1995.
18	Sep 22 1995		Joint appendix filed. VIDED.
		*	Joint appendix in two volumes
19	Sep 22 1995		Brief of appellants Ruth Shaw, et al. filed. VIDED.
20	Sep 22 1995		LODGING consisting of twelve sets of two looseleaf binders containing a notebook of relevant maps and exhibits of plaintiff intervenors submitted by counsel for the petitioners.

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No. 94-923-ATX

Entry	Date	Note	Proceedings and Orders
21	Oct 3 1995		SET FOR ARGUMENT TUESDAY, DECEMBER 5, 1995.(2ND CASE).
22	Oct 4 1995	G	Motion of appellees for divided argument filed.
23	Oct 6 1995		CIRCULATED.
24	Oct 24 1995	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument filed.
25	Oct 24 1995	G	Motion of appellants James Arthur Pope, et al. for divided argument filed.
26	Oct 25 1995	X	Brief amici curiae of North Carolina Legislative Black Caucus, et al. filed. VIDED.
27	Oct 25 1995	X	Brief of appellees Ralph Gingles, et al. filed. VIDED.
28	Oct 25 1995	X	Brief amicus curiae of Congressional Black Caucus filed. VIDED.
29	Oct 25 1995	X	Brief amicus curiae of United States filed. VIDED.
30	Oct 25 1995	X	Brief of State Appellees filed. VIDED.
35	Oct 25 1995	X	Brief amici curiae of American Civil Liberties Union, et al. filed. VIDED.
32	Nov 6 1995		Motion of appellants James Arthur Pope, et al. for divided argument GRANTED.
33	Nov 6 1995		Motion of appellees for divided argument GRANTED.
34	Nov 6 1995		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument GRANTED. The time is divided as follows: appellants Ruth Shaw, et al. - 30 minutes; appellants James Arthur Pope, et al. - 10 minutes; appellees James B. Hunt, Jr., et al. - 20 minutes; appellees Ralph Gingles, et al. - 10 minutes; the Solicitor General - 10 minutes.
36	Nov 9 1995		LODGING by appellants. North Carolina Congressional District map. (Map was previously lodged in 92-357, Shaw v. Reno)
37	Nov 27 1995	X	Reply brief of appellants Ruth Shaw, et al. filed. VIDED.
38	Dec 6 1995		ARGUED.

Supreme Court, U.S.
FILED

94 923 NOV 2 1 1994

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

RUTH O. SHAW, et al.,
Appellants,
and
JAMES ARTHUR "ART" POPE, et al.,
Plaintiff-Intervenors,

v.

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, et al.,
Appellees,
and
RALPH GINGLES, et al.,
Defendant-Intervenors.

APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

JURISDICTIONAL STATEMENT

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44 pp

QUESTIONS PRESENTED

I

WAS NORTH CAROLINA'S RACIALLY GERRYMANDERED REDISTRICTING PLAN ENACTED WITHOUT A COMPELLING STATE INTEREST FOR DOING SO?

II

DID THE GENERAL ASSEMBLY ENACT NORTH CAROLINA'S RACIALLY GERRYMANDERED REDISTRICTING PLAN WITHOUT NARROWLY TAILORING IT?

III

DID THE COURT BELOW NEGATE THE "STRICT SCRUTINY" TEST BY MISALLOCATING THE BURDEN OF PERSUASION, RELYING ON POST HOC RATIONALIZATIONS, AND MAKING CLEARLY ERRONEOUS FINDINGS OF FACT?

THE PARTIES

Appellants, Plaintiffs in the action below, are as follows:
RUTH O. SHAW, MELVIN G. SHIMM, ROBINSON O. EVERETT, JAMES M. EVERETT, and DOROTHY BULLOCK.

Plaintiff-Intervenors in the action below, are as follows:
JAMES ARTHUR "ART" POPE, BETTY S. JUSTICE, DORIS LAIL, JOYCE LAWING, NAT SWANSON, RICK WOODRUFF, J. RALPH HIXON, AUDREY McBANE, SIM A. DELAPP, JR., RICHARD S. SAHLIE, and JACK HAWKE, Individually.

Defendants in the action below, are as follows:
JAMES M. HUNT, JR., in his official capacity as Governor of the State of North Carolina; DENNIS A. WICKER, in his official capacity as Lieutenant Governor of the State of North Carolina, and President of the Senate; DANIEL T. BLUE, JR., in his official capacity as Speaker of the North Carolina House of Representatives; RUFUS L. EDMISTEN, in his official capacity of Secretary of the State of North Carolina; THE NORTH CAROLINA STATE BOARD OF ELECTIONS, an official agency of the State of North Carolina; EDWARD J. HIGH, in his official capacity as Chairman of the North Carolina State Board of Elections; JEAN H. NELSON, in her official capacity as a member of the North Carolina

State Board of Elections, LARRY LEAKE, in his official capacity as a member of the North Carolina State Board of Elections, DOROTHY PRESSER, in her official capacity as a member of the North Carolina State Board of Elections, and JUNE K. YOUNGBLOOD, in her official capacity as a member of the North Carolina State Board of Elections.

and

Defendant-Intervenors in the action below, are as follows:
RALPH GINGLES, VIRGINIA NEWELL, GEORGE SIMKINS, N. A. SMITH, RON LEEPER, ALFRED SMALLWOOD, DR. OSCAR BLANKS, REVEREND DAVID MOORE, ROBERT L. DAVIS, C. R. WARD, JERRY B. ADAMS, JAN VALDER, BERNARD OFFERMAN, JENNIFER McGOVERN, CHARLES LAMBETH, ELLEN EMERSON, LAVONIA ALLISON, GEORGE KNIGHT, LETO COPELEY, WOODY CONNETTE, ROBERTA WADDLE, and WILLIAM M. HODGES.

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IN THE
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RUTH O. SHAW, et al.,
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APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The judgment and opinion, as amended, of the three-judge district court are contained in the Appendix to Jurisdictional Statements filed jointly by these

appellants, who were the five original plaintiffs, and by the eleven plaintiff-intervenors, who are also appealing [hereafter "App.J.S."], at pages 1a to 154a.

JURISDICTION

The district court entered judgment against appellants on August 1, 1994, and at the same time a majority opinion was filed, as well as the dissenting opinion of Chief Judge Voorhees. On August 15, 1994, plaintiffs filed a motion to amend and add findings pursuant to Rule 52(b) of the Federal Rules of Civil Procedure. On August 22, 1994, amended opinions were filed by the majority and the dissenting judge in the district court. On August 29, 1994, plaintiffs filed a notice of appeal. On September 1, 1994, the district court denied plaintiffs' 52(b) motion and on September 15, 1994, the plaintiffs filed a supplemental notice of appeal. Subsequently, pursuant to Rule 22 of the Rules of the Supreme Court, the plaintiffs and plaintiff-intervenors filed a motion applying for a determination that the time for docketing the appeals in this case, together with the consolidated single appendix to the jurisdictional statements of plaintiffs and plaintiff-intervenors, run to and including November 21, 1994. This motion was granted by the Chief Justice. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case arises under the Fourteenth and Fifteenth Amendments to the Constitution of the United States and involves Sections 2 and 5 of the Voting Rights

Act of 1965, as amended, 42 U.S.C. §§ 1973b, 1973c (1973), which are reprinted in Plaintiff-appellants' Appendix to this Jurisdictional Statement (pp.A1-A-4). The appeal concerns the constitutionality of Chapter 7 of the 1991 Extra Session Laws of North Carolina (hereinafter "Chapter 7"), the challenged congressional redistricting statute and amends Chapter 163, Article 17 of the North Carolina General Statutes. Chapter 7 is reprinted at App.J.S. pp. 169a to 240a. A map of the Chapter 7 congressional plan was appended to the Court's Opinion in the first appeal of this case, *Shaw v. Reno*, ___U.S.___,113 S.Ct. 2816 (1993) (hereafter "*Shaw*").

STATEMENT OF THE CASE

This appeal from the decision rendered by a divided three-judge district court raises substantial questions concerning the constitutionality of the current North Carolina congressional redistricting plan.[1] All three judges in the court below found this plan to be a racial gerrymander. However, a majority concluded that the plan survived "strict scrutiny" because it was "narrowly tailored to further the State's compelling interest in complying with theVoting Rights Act." (App.J.S. at 7a). That conclusion gave rise to this appeal.

The challenged redistricting plan was enacted by the General Assembly on January 25, 1992, after an

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1 Chief Judge Voorhees' extensive dissent in the court below makes obvious the importance of these questions. (App.J.S. at 116a-154a) *See also* footnote 55 of Judge Edith Jones' opinion in *Vera v. Richards*, No. H-94-2077 (S.D.Tex. Aug. 17, 1994)

earlier plan had been denied preclearance by the Attorney General pursuant to Section 5 of the Voting Rights Act, *see* 42 U.S.C. § 1973c. The current plan first was attacked unsuccessfully as an unconstitutional political gerrymander directed against Republicans. *Pope v. Blue*, 809 F.Supp. 392 (W.D.N.C. 1992), *affirmed* 506 U.S. ____, 113 S.Ct. 30 (1992). Then on March 28, 1992, the five plaintiff-appellants filed an action against various Federal and State officials in which they alleged that the redistricting plan was an unconstitutional racial gerrymander.

The district court granted motions to dismiss as to all the defendants, although Chief Judge Voorhees dissented from the ruling that the plaintiffs had failed to state a claim for relief against the State defendants. *Shaw v. Barr*, 808 F.Supp. 461 (E.D.N.C. 1992). Upon appeal, this Court upheld the dismissal below of the Federal defendants; but it decided that, under the Equal Protection Clause of the Fourteenth Amendment, the five plaintiffs had stated a claim for relief against the State defendants. *Shaw*, *supra* [2] The case was remanded to the three-judge court for it to decide whether the redistricting plan was a racial gerrymander, as the plaintiff-appellants had alleged, and, if so, whether the plan was justified by "a compelling governmental interest" and was "narrowly tailored". (*Shaw*, 113 S.Ct. at 2832)

Upon remand, the district court allowed twenty-two registered voters from various congressional districts to intervene as defendants. Eleven other registered voters

2 The Court did not find it necessary to decide whether plaintiffs had also stated a claim for relief under Article I, § 2 of the Constitution or under the Fifteenth Amendment.

were permitted to intervene as plaintiffs.[3] Extensive discovery then commenced with defendants taking the five plaintiffs' depositions; and thereafter the various parties deposed numerous experts, as well as some legislators and lay witnesses. In some instances, discovery was limited by an order of the district court which recognized a "legislative privilege" on the part of the General Assembly's members and staff.

After discovery had been completed, the plaintiff-intervenors moved to enjoin the defendants from conducting any further election under the current redistricting plan. Over Chief Judge Voorhees' dissent, the motion was denied. Likewise, the plaintiffs failed in their motion *in limine* to prevent the defendants from offering evidence based on census data and socioeconomic information which had not become available until January 1993 -- a year after enactment of the redistricting plan.

On March 28, 1994, a six-day trial commenced, at which each of the four groups of parties was allowed to call one expert and one lay witness, as well as to offer in evidence extensive stipulations, depositions, and other documentary evidence.[4] On August 1, 1994, judgment was entered for the defendants with Chief Judge Voorhees

3 Jack Hawke, the Chairman of the Republican Party of North Carolina, was allowed to intervene individually as a plaintiff, but not in his official capacity.

4 Also, at a computer workstation the three judges viewed a demonstration of how computer technology and census bloc information had been used together to draw the boundaries of congressional districts in North Carolina.

dissenting; and majority and dissenting opinions were filed. On August 22, 1994, amended opinions were filed. Meanwhile, the plaintiffs had moved to amend and add findings pursuant to Fed. R. Civ. P. 52(b); but this motion was denied on September 1, 1994 -- again over the dissent of Chief Judge Voorhees. Plaintiffs and plaintiff-intervenors all duly filed notices of appeal.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

On their prior appeal, the five plaintiff-appellants presented squarely to this Court the question of whether they could attack a racially gerrymandered redistricting plan which had been enacted by the General Assembly in order to assure that two African-Americans would be elected to Congress from North Carolina. Reversing the majority decision of the three judges, this Court ruled that, as registered voters, the plaintiffs -- regardless of their race -- had stated a claim for relief. However, upon remand, it would be necessary for them to prove their allegations at trial; and, if they did so, the plan would be subject to "strict scrutiny" to "determine whether the North Carolina plan is narrowly tailored to further a compelling governmental interest". (113 S.Ct. at 2832)

By means of overwhelming direct and circumstantial evidence -- and over the defendants' stubborn opposition[5] -- the plaintiffs convinced all three

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5 During the oral argument before this Court, Mr. Powell, who represented the State defendants, responded to a question from the Court: "There's no dispute here over what the State's purpose is.
(continued...)

judges of the court below that the redistricting plan is a racial gerrymander. Moreover, the district court properly interpreted *Shaw* to mean that voters of all races have standing to attack North Carolina's racial gerrymander.[6]

5(...continued)
There's a dispute over how to characterize it legally, but we're not in disagreement over what the State legislature was trying to do" (Transcript of Oral Argument at p.38). As plaintiff-appellants interpreted this statement, the State conceded that the redistricting plan was a racial gerrymander, but contended that such a gerrymander was constitutional. Nonetheless, upon remand, the defendants hotly contested that a racial gerrymander had been enacted.

6 The evidence at trial made clear that plaintiffs Shaw and Shimm, who reside in the Twelfth Congressional District, not only have suffered injury to their "personal dignity" by being assigned to vote on a racial basis but also have suffered other injury. The shape of the "bizarre" district in which they have been placed reflects its purpose to guarantee that an African-American will be elected to Congress; and white voters like plaintiffs Shimm and Shaw perceive that the Representative elected from the district is "more likely to believe [his] primary obligation is to represent only "African-Americans:. *See Shaw*, 113 S.Ct. at 2832. This perception of having "second class status" discourages these voters from participating actively in congressional primaries and elections. [Transcript 1089-1090 (Shimm Testimony)]. The correctness of their perception was corroborated recently when Twelfth District Congressman Melvin Watt stated during a panel discussion "that it adds to the debate to be able to bring up a perspective *without catering, or having to cater to the business or white community.*" [Transcript p. 999, (Watt Testimony)] (emphasis supplied). [*See also* footnote 5 of Chief Judge Voorhees' dissent, (App. J.S. 128a)] Congressman Watt's mindset is also revealed by his statement on the McNeilll-Lehrer television program that he had "characterize[d] Justice O'Connor's opinion in *Shaw* as "racist". [Transcript 995 (Watt Testimony)]. Plaintiffs Shaw
(continued...)

Consequently, the district court was required to apply the "strict scrutiny" test to the gerrymander; and its misapplication of that test presents on this appeal the substantial and important questions of what constitutes a "compelling State interest" and when a racially gerrymandered plan is "narrowly tailored".[7]

This appeal also presents substantial and important questions about the methodology employed by the court below in applying the "strict scrutiny" test. Paradoxically, the burden was placed on the plaintiffs of persuading the factfinders that there was no "compelling State interest" and that the gerrymander was not "narrowly tailored" (App.J.S. 42a-43b). Furthermore, despite an extensive legislative record to the contrary, the majority in the district court accepted "post hoc rationalizations" in assuming the presence of a legislative intent which could

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6(...continued)
and Shimm, along with *all* other voters in the Twelfth District, were specially injured by being placed in that district because its confusing boundaries and its bisecting of several Metropolitan Statistical Areas (MSA's) and media markets make the district "dysfunctional". [Transcript pp. 209, 219-220, 232 (O'Rourke Testimony)]

7 The importance of these questions is underscored by the fact that three-judge district courts in Louisiana, Texas, and Georgia have also been recently required to apply the "strict scrutiny" test to racially gerrymanderered congressional redistricting plans. [*See Hays v. Louisiana*, 839 F.Supp. 1188 (W.D.La. 1993) (*Hays I*) *vacated*, *Louisiana v. Hays*, 114 S.Ct. 2731, adopted by reference, *Hays v. Louisiana,(Hays II)* No. 92-1522 (W.D.La. 1994); *Vera v. Richards*, *supra*, n.1; *Johnson v. Miller*, No. 194-008 (S.D.Ga. Sept.12, 1994)

not possibly have existed.[8] This Court should decide whether these evidentiary rulings were contrary to the spirit and purpose of the "strict scrutiny" test.[9]

I. The Evidence Reveals Clearly that North Carolina's Racially Gerrymandered Redistricting Plan Did Not Further A Compelling State Interest.

Having found on remand that the plaintiffs had proved the redistricting plan to be a racial gerrymander, the three-judge district court should have subjected it to "strict scrutiny". *Shaw, supra*; *cf. Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Unfortunately, only Chief Judge Voorhees applied this test correctly -- while the majority below ignored undisputed evidence which demonstrated the absence of any "compelling State interest".

The majority's first mistake was in stating the issue to be whether the State "had a compelling interest in enacting *any* race-based redistricting plan" -- rather than "enacting the *particular* race-based redistricting plan under challenge" (App.J.S. at 43a-44a) (emphasis in original). In this way, the burden to be carried by the State was

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8 The majority inferred the legislative intent from census data and socioeconomic information which only became available a year after Chapter 7 was enacted. This technique for determining legislative intent was criticized in *Hays I, supra*, n.7

9 The erroneous evidentiary rulings in the court below led to clearly erroneous findings. Plaintiff-appellants attempted to clarify the record for appellate review by moving under Rule 52(b) to amend and add findings; but this motion was denied.

reduced far below what *Shaw* had in mind in requiring that "strict scrutiny" be given to racial gerrymanders.

Under *Shaw* it should be immaterial that the State might be able to imagine a "compelling governmental interest" in enacting some hypothetical redistricting plan -- such as a plan which is "race-based" in that it seeks to avoid splitting neighborhoods in which African-Americans or Native Americans are concentrated. The real question that the court below should have answered was whether North Carolina had a "compelling governmental interest" in enacting a redistricting plan which, in order to create two majority- black districts and guarantee the election of two African-Americans to Congress, ignored traditional redistricting principles, such as compactness, contiguousness, communities of interest, and maintenance of the integrity of political subdivisions. On the evidence at trial, the answer to that question should have been in the negative.[10]

The majority in the court below stretches the facts in a vain attempt to give an affirmative answer to its misleading question whether "any race-based redistricting plan" could have been justified by "the State's compelling interest in complying with the Voting Rights Act". (App.J.S. 7a, 44a-57a) According to its version, after the

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10 It is doubtful that any state interest could be so "compelling" as to permit the total disregard of traditional redistricting principles which is manifested by the North Carolina racial gerrymander. *Shaw* indicates that a majority-black district can only be created when the State "employs sound districting principles" and only when the affected racial group's "residential patterns offer the opportunity of creating districts in which they will be in the majority". 113 S.Ct. 2832.

first redistricting plan was denied preclearance, the General Assembly "reasonably conclude[d], after conducting its own independent reassessment of the rejected plan in light of the concerns identified by the Justice Department, that the Justice Department's conclusion is legally and factually supportable". (App.J.S. at 54a)

From the summer of 1991, when the first redistricting plan was enacted, until after it was denied preclearance on December 18, 1991, State officials consistently took the position that the first plan -- which contained only one minority-black district -- adequately complied with the Voting Rights Act. Moreover, even after the denial of preclearance, a court action in the District of Columbia was considered by the General Assembly -- until a method was suggested for satisfying the demands of the Department of Justice and at the same time protecting Democratic incumbents and candidates. Clearly the enactment of the redistricting plan was not the result of a newly-formed belief by the General Assembly that two majority-black congressional districts were necessary to comply with Sections 5 and 2. Instead, the legislature made a tactical choice to accede to demands by the Attorney General that were generally perceived as unreasonable.[11]

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11 In their answer, the State defendants alleged that the Attorney General's "interpretation of the Voting Rights Act...required the creation of two majority-minority congressional districts in North Carolina" (Defendants Answer para.23); that to "comply with Section 2 of the Voting Rights Act, the State was required to enact a congressional redistricting plan with two majority-minority districts in

(continued...)

Shaw recognized that states have an interest "in complyin with federal antidiscrimination laws that are constitutionally valid *as interpreted and as applied.*" 113 S.Ct. 2830 (emphasis supplied). By negative implication this statement suggests that a state has no "compelling interest" in complying with requirements for Section 5 preclearance which far exceed the intent of the Voting Rights Act and violate the Equal Protection Clause. Certainly *Shaw* did not intend to immunize racial gerrymanders enacted by a legislature which surrendered to unreasonable interpretations of the Voting Rights Act by the Attorney General. Otherwise, in practical effect, the Civil Rights Division could expand the Voting Rights Act beyond what Congress intended or the Constitution permitted.[12]

The undisputed evidence offered at trial makes clear that the Civil Rights Division was using its preclearance power under Section 5 to rewrite the Act by requiring proportionate representation. On January 24, 1992 -- the day when the current redistricting plan was

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11(...continued)
order to avoid dilution of African-American voting strength". (Ans. Fifth Defense) In effect, these allegations admit the fact, demonstrated by uncontradicted evidence, that the General Assembly enacted the second redistricting plan, because otherwise preclearance would be denied by the Civil Rights Division and not because of any "independent reassessment of the rejected plan".

12 Furthermore, a State's interest in obtaining preclearance from the Department of Justice is not "compelling", because the State has available to it the alternative of seeking preclearance in the District Court of the District of Columbia with direct appeal to the Supreme Court. 42 U.S.C. § 1973c.

enacted -- Senator Dennis Winner, the Chairman of the Senate Redistricting Committee, described to the North Carolina Senate what had occurred at a meeting that he, Speaker Daniel Blue, and others had with Assistant Attorney General John Dunne on December 17, 1991, the day before preclearance had been denied: [13]

> And I could not figure out why they called us up there and don't understand that to this day. And Mr. Dunne, some of the staff asked a question or two or said -- made an occasional comment, Mr. Dunne did most of the talking. The essence of what he said at that meeting was -- and he said this in different ways over, and over, and over again -- you have twenty-two percent black people in this State, you must have as close to twenty-two percent black Congressmen, or black Congressional Districts in this State. Quotas.

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13 See Daily Proceedings in the Senate Chamber for Friday, January 24, 1992, at p. 4. At his pretrial deposition, Senator Winner waived his "legislative privilege" and testified that, at the meeting in Washington on December 17, 1991, Assistant Attorney General John Dunne had told him and other representatives of the General Assembly, "that we ought to have a quota system with respect to minority seats. You had 22 percent blacks in this state. Therefore, you ought to have as close to that as you could have of congressional districts. That is really all I remember about it . . . . I think his substance was really that you had -- if you had 22 percent blacks in North Carolina that you ought to have 22 percent minority congressional seats. Whatever shape didn't matter." (Winner Deposition Jan. 11, 1994. pp. 6, 10, 17-19)

Senator Winner's account of the position taken by Assistant Attorney General Dunne is corroborated by the language of Dunne's letter of December 18, 1994, denying preclearance. Also, it fits perfectly with the findings of other three-judge district courts that the Civil Rights Division required maximization of majority-black districts as a requirement for preclearance of redistricting plans in Louisiana and Georgia. *See Hays I, supra; Johnson v.* **Miller, supra.**

Maximization of majority-minority districts is not required by the Voting Rights Act. ***Johnson v. DeGrandy, ___U.S. ___, 114 S.Ct. 2647 (1994). Indeed, as the three-*** judge district court explained in footnote 21 of *Hays,* **supra,** ***the Civil Rights Division's insistence on*** maximization of majority-minority districts not only is unauthorized by the Voting Rights Act but also contravenes Section 2's prohibition of requiring proportional representation.[14] Yet that insistence, to which the General Assembly of North Carolina capitulated, was erroneously relied on by the majority in the court below to find "a compelling State interest" which overcomes the equal protection rights of the plaintiff-appellants.[15]

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14 (839 F.Supp. 1196-7, n.21). In his majority opinion in *Johnson v. Miller, supra,* Judge Edenfield has described in some detail the questionable and coercive tactics used by the Civil Rights Division in its effort to make the Georgia legislature follow a policy of maximizing majority-black districts.

15 To allow a "Nuremberg defense" and find as a "compelling interest" that the State was forced to comply with the Section 5 preclearance requirements imposed by the Civil Rights Division tends

(continued...)

The majority in the court below also found that the denial of preclearance caused the General Assembly to become fearful that any redistricting plan without two majority-black districts would violate Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. To this end, the majority equated the letter of December 18, 1991 denying preclearance to "an 'administrative finding' that its proposed plan violates the anti-discrimination provisions of the Voting Rights Act, which is sufficient -- unless clearly legally and factually unsupportable -- to justify its adoption of a race-based alternative plan designed to remedy that violation". (App.J.S. p. 54a, n. 34)

Treating the letter in this manner gives it an effect not suggested by its language. Moreover, Congress never intended that a denial of preclearance by the Civil Rights Division would give rise to a "compelling State interest" in enacting a racial gerrymander. In any event, the "administrative finding" by Assistant Attorney Dunne was "clearly legally and factually unsupportable" because of its false premise that the maximization of minority-black districts is required by the Voting Rights Act.

The three preconditions for establishing vote dilution in multi-member districts in violation of Section 2 are that a minority group be "sufficiently large and geographically compact to constitute a majority in a single-member district"; that it be "politically cohesive"; and that "the white majority vot[e] sufficiently as a block to enable it...usually to defeat the minorities preferred

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15(...continued)
to induce collusion between the Department of Justice and State legislatures in creating racial gerrymanders.

candidates". *Johnson v. DeGrandy, supra*; *Thornburg v. Gingles,* 478 U.S. 30, 50-51 (1986). The same preconditions apply to single-member congressional districts. *Growe v. Emison,*507 U.S.____, 113 S.Ct. 1075 (1993).

As this Court recognized in *Shaw*, the black population of North Carolina is "relatively dispersed; blacks constitute a majority of the general population in only 5 of the State's 100 counties" (113 S..Ct. at 2820). Consequently, a congressional redistricting plan would not violate Section 2 of the Voting Rights Act, even if it contained *no* majority black districts.[16]

After enacting the first redistricting plan -- which had only one majority-black district -- the General Assembly contended for months that it complied fully with Section 2 and that because of the lack of "geographical compactness" of the black population, *Gingles* did not

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16 In North Carolina the second *Gingles* precondition is met, for ninety-five percent or more of the African-American voters are registered as Democrats and they vote cohesively for black Democratic candidates. On the other hand, the third precondition is absent. White voters in North Carolina are less cohesive than blacks and often are disposed to vote for black candidates against whites. (Keech Deposition, (*passim*) For example, in her deposition, (at p. 34) plaintiff Shaw testified in response to defendants' questions that in 1982 and 1984 she had voted in the Democratic congressional primary for an African-American candidate against a white candidate. As a result of "white crossover", a number of African-Americans have been nominated or elected for local and state office even when black voters were not in the majority.

apply.[17] Under these circumstances, the effort by the majority in the court below to find a "compelling State interest" in the imagined desire of the General Assembly to avoid a Section 2 violation is devoid of any factual or legal basis.

Although the majority purports to invoke various other "compelling State interests", clearly its real concern is with the "interest" in guaranteeing greater racial diversity of North Carolina's congressional delegation in order to make reparations for the absence of any black member of Congress from North Carolina since 1901. Thus, the majority opinion refers in its "Conclusion" to "the inability of any African-American citizen of North Carolina, despite repeated responsible efforts, to be elected in a century". (App.J.S. at 114a). Consequently, the question is raised whether, by means of a racial gerrymander, a state may establish racial quotas for its congressional delegation because of a "compelling interest" in rectifying supposed past discrimination.

To use quotas, however, furthers no "compelling interest" but, instead, leads only to the disaster of "Balkanization" and racial polarization. Especially when traditional redistricting criteria are disregarded and

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17 As the legislative record shows, Daniel Blue, the Speaker of the House of Representatives, and "Toby" Fitch, a co-chairman of the House's Redistricting Committee -- both of whom are African-Americans -- signed submissions to the Department of Justice which were intended to make clear that the *Gingles* preconditions were not met. In his deposition, Senator Winner stated that it had been his belief that Section 2 of the Voting Rights Act did not require the creation of even one minority-black congressional district in North Carolina.

"bizarre" districts are formed, the State sends a clear message that it accepts and relies on racial stereotypes and, by so doing, perpetuates and reinforces those stereotypes and destroys confidence in the electoral process. *Cf., J.E.B. v. Alabama ex rel. T.B.*, ___U.S.___ 114 S.Ct. 1419 (1994) (condemning reliance on gender stereotypes).[18]

Furthermore, some of the burden of the quotas falls upon voters who had no connection with the past discrimination. Thus, plaintiff Shaw, who moved to North Carolina from Minnesota, and plaintiff Shimm, who came from New York, had no part to play in any past discrimination against blacks in North Carolina;[19] and yet, they have been placed in a dysfunctional minority-black congressional district, where they correctly perceive that they have "second-class status" and that their political participation is discouraged. Indeed, the mobility of the American population (see Stipulation 146) allows little relationship to exist between those whites who perpetrated past discrimination against blacks and those whites subjected to the burdens of racial gerrymandering -- or between the blacks who were the victims of past

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18 The Court seems to be increasingly committed to the view that States must be neutral with respect to their citizens and groups of citizens. *Cf., Board of Education of Kiryas Joel Village School District v. Grumet*, ___U.S.___, 114 S.Ct. 2481 (1994) (disapproving boundaries of school district gerrymandered to further religious instruction).

19 Ironically, as Professor Shimm testified in his deposition, members of his family had undergone persecution in the Holocaust; and he personally had been a victim of discrimination -- rather than a perpetrator.

discrimination and those blacks who are now the intended beneficiaries of racial quotas for political office.

The majority's rationale also is based on the false premise that African-Americans can be elected to Congress from North Carolina only from majority-black districts. Since approximately 95% of the registered black voters in North Carolina are Democrats and the Democrats have closed primaries, a good opportunity exists for an African-American to obtain the Democratic nomination and be elected from a district where blacks are not a majority. In a number of recent elections, blacks have won local and statewide offices in races against whites. Moreover, in order to enhance the opportunity for minority candidates to be elected, the General Assembly changed the election laws in 1989 to dispense with a second primary if the leader in the first primary received more than 40% of the votes cast. (N.C.G.S. § 163-111; Stipulation 127).

The reference by the majority in the court below to "repeated responsible efforts" of African-Americans to be elected to Congress is misleading. The only serious efforts were in the Second District. The first two of those efforts by black candidates (Eva Clayton and Howard Lee) were against an experienced and well-entrenched incumbent (L. H. Foutain). The more recent efforts were in 1982, when an African-American candidate (H.M. Michaux, Jr.) received 46% of the vote in the Democratic primary in the Second District; [20] and in 1984, when a

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20 Under the 1989 change in the election code, H.M. Michaux, Jr., the African-American, who led in the first primary and received

(continued...)

different African-American candidate received 48% of the vote.[21] Under these circumstances, there is ample reason to believe that in some congressional districts drawn pursuant to traditional redistricting principles African-Americans would be elected from North Carolina.[22]

Even if it were assumed that blacks can only be elected to Congress from North Carolina if majority-black districts are created, the substantial question remains whether the interest in achieving this diversity is so "compelling" as to justify the creation of dysfunctional congressional districts that totally disregard traditional redistricting principles such as compactness, contiguousness, communities of interest, and maintaining the integrity of political subdivisions. In an extensive footnote, the majority in the court below opines that "objective evidence" reveals -- "perhaps counter-intuitively"

20(...continued)
more than 40% of the vote, would have won the Democratic nomination.

21 Both African-American candidates were from Durham, and received many "white crossover" votes from white voters such as plaintiff Shaw. In 1984, Kenneth Spaulding, the black candidate, ran against Tim Valentine, who had defeated Michaux two years before and was now an incumbent. Thus, the increased percentage of the vote for the African-American candidate is even more significant.

22 In view of the small number of black candidates for Congress until 1992, it is a fallacy to conclude -- as did the majority below -- that blacks could not be elected from North Carolina without a racial gerrymander. The same logic would lead to the erroneous conclusion that because women had never been elected to Congress in the past they could not be elected without the benefit of a quota.

-- that "bizarre", "ugly" shapes really make no difference because, in due course, voters will learn who represents them in Congress. (App.J.S.. at p. 106a, n. 60).

This observation by the majority brushes aside as irrelevant the evidence at trial concerning confusion on the part of voters as to their district and their representative.[23] It ignores evidence that, according to a poll commissioned by the State defendants in the fall of 1993, only 6% of the voters knew who was their congressman.[24] It disregards the adverse effects on "political access" of having districts like the Twelfth -- which is not compact and extends through three Metropolitan Statistical Areas (MSA's) and three media markets.[25] Finally, it is at odds with the purpose of

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23 For example, the affidavit of David Stradley (Exhibit 104) describes the confusion in his princinct, the Chambersburg precinct in Iredell County, which is split among three congressional districts. The headline "2nd, 12th District lines still unclear for many voters", which appeared in the Durham, North Carolina Herald-Sun on November 9, 1994 (at p.A7), attests to the continuing confusion of voters about the boundaries of congressional districts.

24 According to the poll, which was commissioned by the State and conducted in October and November 1993, only 6% of those polled in the Twelfth District knew that their congressman was Melvin Watt. On the other hand, 6% believed their congressman was [Senator] Jesse Helms; 8% believed their congressman was Alex McMillan [who represented the Ninth District] and 12% believed their congressmana was Howard Coble, [who represented the Sixth District]. [Transcript at 841-842, 866-869 (Lichtman Testimony)].

25 Professor Timothy O'Rourke explained that a geographically compact congressional district serves in many ways the interests of

(continued...)

2 U.S.C. § 2(c), which requires single-member congressional districts.[26]

Implicit in the majority's opinion is the view that a state has a compelling interest in guaranteeing "descriptive representation".[27] This view is based on a racial stereotype -- only a black officeholder can adequately represent blacks[28] -- that *Shaw* condemns.[29] This Court

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25(...continued)
"political access" of voters to their representatives and to candidates for office. [Transcript, pp. 209-220 (O'Rourke Testimony)]

26 Presumably, the requirement of single-member districts was imposed in order to enhance "political access" to Representatives. Congress did not require that a member of Congress reside in the district from which he or she is elected. However, it probably never contemplated that -- as happened in North Carolina on November 8, 1994 -- Sue Myrick, who resides in the Twelfth District, would be elected to Congress from the Ninth District (see The Herald-Sun. Durham, N.C., November 10, 1994 (at C-3) and that Walter Jones, Jr., who resides in the First District, would be elected to Congress from the Third District.

27 In her recent book about the representation of black interests in Congress, Carol Swain, an African-American political scientist, makes the important distinction between "descriptive representation" -- representation by black officeholders -- and "substantive representation" -- representation by someone who advances the interests of black voters. See Swain, Black Faces, Black Interests, page 5 (1993).

28 The logical, but equally unacceptable, corollary would be that only white officeholders can adequately represent the interests of white voters.

(continued...)

should now decide whether *Shaw* permits reliance on such racial stereotypes to establish a "compelling State interest" which justifies a racial gerrymander.

II. North Carolina's Redistricting Plan Was Not "Narrowly Tailored"

Even the majority in the court below concedes that the two majority-black districts "are not the two most geographically compact... that could have been created were no factors other than equal population requirements and effective minority-race voting majorities taken into account" (Finding 4, App.J.S. p.109a).[30] The ensuing attempt to excuse this lack of compactness (see Findings 5 and 6) raises substantial questions both as to whether "narrow tailoring" has been established and as to the legitimacy of the methodology the majority employed.[31]

The requirement of "narrow tailoring" suggests the

29(...continued)
29 The rejection of racial stereotypes in *Shaw* follows a line of cases stemming from *Batson v. Kentucky*, 476 U.S. 79 (1986). Recently, in extending *Batson* to prohibit gender-based peremptory challenges, this Court denounced gender stereotypes, *J.E.B. v. Alabama ex rel. T.B., supra.*

30 According to a study, North Carolina's Twelfth District is the least "geographically compact" out of all 435 districts in the United States. Moreover, North Carolina has four of the 28 least geographically compact congressional districts. [Transcript p. 217 (O'Rourke Testimony)].

31 The majority's dubious methodology is the subject of question III in this Jurisdictional Statement.

need for an effort to match the remedy with the supposed harm.[32] No such effort was made in drawing North Carolina's redistricting plan. For example, at the time of redistricting, blacks in the Twelfth District were registered to vote at a slightly higher rate (54.71%) than whites (53.34%). Only two of the ten counties bisected by the Twelfth District are among the 40 North Carolina counties which have been subject to preclearance at any time; and only 73.4% of the voters in the Twelfth District reside in the eight counties never covered under Section 5. Futhermore, of the forty counties covered under Section 5, sixteen are outside either the First or Twelfth District.[33]

Thus, many of the persons who were subjected to the most baneful effects of the racial gerrymander did not reside in the areas where blacks had not been participating equally in the electoral process when the Voting Rights Act was enacted. Also, many of the African-Americans who received the supposed benefits of being placed in minority-black districts were not those who at some earlier time had been precluded from equal political participation. These disparities reflect the absence of "narrow tailoring".

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32 *Cf. Richmond v. J.A. Croson Co., supra.* Insistence on this matching would parallel the imposition of due process requirements of "essential nexus", "rough proportionality", and "individualized determination" when property is taken for a paublic purpose. *Dolan v. City of Tigard,* ___U.S.___, 114 S.Ct. 2309 (1994).

33 Because of their proximity to the majority-black districts, 11 of the 16 covered counties could readily have been included in such districts if the General Assembly had "narrowly tailored" the districts to remedy past discrimination.

The finding by the majority in the district court that there were "internally homogeneous commonalities of interest" in the majority-black districts is at odds with the testimony of defendants' witness, Gerry Cohen, that the blacks residing in the major cities of the Twelfth District "have been tied together with corridors with a requisite number of whites to meet the one-person, one-vote standard". [34] Thus, "homogeneity" was equated with race in a manner condemned by *Shaw*. Furthermore, the creation of these "corridors" violated the equal protection rights of whites by purposefully directing against them the adverse effects of the fragmentation of precincts and census blocks.[35]

The majority's description of the "homogeneity" of the "rural" First District is irreconcilable with the undisputed evidence that the First District divides twelve towns with a population of 10,000 or more; [36] and the

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34 [Transcript at p. 614 (Cohen Testimony)] Cohen played the major role for the General Assembly in using computer technology to draw the districts; and he personally operated the computer terminal utilized for this purpose. Plaintiff-appellants Shaw and Shimm live in one of the "corridors of whites" to which Cohen alluded.

35 To create two majority-black districts, it was necessary to divide various precincts and even census blocks. Predominantly white precincts and census blocks were divided, but predominantly black were not. [Transcript pp. 496, 613, 614 (Cohen Testimony); Transcript pp. 94-100, 106, 107, 189, 190 (Hofeller Testimony)] .

36 Fayetteville has a population of 75,928, of which 20, 337 blacks and 5,940 whites were placed in the First District; Greenville has a population of 45,000, of which 13,197 blacks and 5,082 whites

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entire legislative record -- which was an exhibit at trial -- contains no reference to the "distinctiveness" and "homogeneity" of the voters placed in the two majority-black districts.[37] Moreover, because the districts were drawn by use of computer technology to display North Carolina's 229,000 census blocks on the computer screen,[38] and the only data then available concerned race, "homogeneity" could only be sought by relying on race. Thus, the majority's finding as to "homogeneity" of the districts stems from the very same racial stereotypes which this Court condemned in *Shaw*.[39]

36(...continued)
were placed in the First Disitrict; and from the seaport city of Wilmington 15,369 blacks and 4,660 whites were placed in the First District. [Transcript at pp. 609-611 (Cohen Testimony)] Like the "urban" Twelfth District, the "rural" First District divides twelve towns with a population of more than 10,000; and for census purposes such towns are "urban".

37 [Transcript at pp. 1028, 1037, 1041, 1046-1048 (Pope Testimony)]. If the General Assembly sought to attain "homogeneity", this goal existed only as to blacks -- and not as to whites. Any such race-based disparity of treatment would itself violate the Equal Protection Clause.

38 Likewise, the General Assembly computer was used to draft Chapter 7, the lengthy and detailed redistricting statute. (App.J.S. pp. 169a-240a) A cursory examination of this statute makes obvious that a legislator would find it impossible to draw any conclusion aabout the "internal homogeneity" of the twelve districts created by that statute.

39 The three-judge district court made this point in *Hays I*. Moreover, even if greater "homogeneity" in socioeconomic

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Even if "incumbent protection" -- another goal of North Carolina's racial gerrymander -- might sometimes be a permissible goal of redistricting, it has nothing to do with remedying past racial discrimination and is at odds with "narrow tailoring".[40] However, the North Carolina racial gerrymander went beyond "incumbent protection" to protect Eva Clayton, then only an announced candidate, by moving Vance County from another district into the First District. [Transcript at 590, (Cohen Testimony)] Also, the boundaries were drawn in a way that would permit two black members of the General Assembly to run at some future time. [Transcript at 591-592, (Cohen Testimony)] Indeed, as part of the "narrow tailoring", the North Carolina House of Representatives transferred to the First District 131 residents of Wayne County, of whom 110 were white, in order "to needle the president pro tempore of the Senate". [Transcript 611 (Cohen Testimony)]

Some black precincts in Winston-Salem, one of the largest cities in North Carolina, were at one point to be included in the majority-black Twelfth District. However, they were transferred to another district and replaced by some black populations in a smaller city, Gastonia; and these were connected to the Twelfth District by a narrow corridor. [Transcript 977 (Watt testimony)] This change

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39(...continued)
characteristics might be attained by grouping persons according to race, this is not a valid justification for such grouping.

40 Perhaps some of the incumbents being protected had been elected to office initially as a result of past discrimination against African-Americans.

was at odds with any goal of achieving "homogeneous communities of interest".[41] Once again there is revealed the absence of the "narrow tailoring" which the Court referred to in *Shaw*. *Cf. Richmond v. J. A. Croson., supra.*

The majority found that the General Assembly sought to maintain "technical territorial contiguity" (App.J.S. 109a). This refers to an effort by draftsmen of the North Carolina plan to comply in form with the standard of "contiguity" while ignoring it in substance. For example, in some instances, portions of a North Carolina congressional district will touch another only at an imaginary point shown on a computer screen. Moreover, North Carolina's plan has employed the unique and unprecedented device of the "double crossover" -- a single imaginary point at which each of two Districts is "contiguous". [42] The Court should decide whether under *Shaw* such redistricting practices are included within "narrow tailoring".

III. The District Court Misallocated The Burden Of Persuasion And Erroneously Relied On Post Hoc Rationalizations

In their answer, the defendants attempted to allege

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41 On the other hand, the transfer favored a black candidate from the Charlotte area like Melvin Watt. (*Ibid.*)

42 [Transcript at pp. 212, 276-277 (O'Rourke Testimony)]. For example, there is a "double crossover" between the First and Third Districts: no one can go from the eastern to the western part of the Third District without going through the First District; nor can anyone go from the northern to the southern part of the First District without going through the Third District.

affirmatively that the redistricting plan was "narrowly tailored" to further a "compelling State interest"; and the district court properly imposed on them the burden of producing evidence as to these defenses. It should also have placed the burden of persuasion on the defendants, for usually a party bears this burden as to its affirmative allegations and as to issues on which it must produce evidence. See 9 Wigmore, Evidence § 2486 (Chadbourne Rev. 1981); 2 McCormick, Evidence § 337 (4th Ed. 1992). Still another reason to place the burden of persuasion on the defendants was because they invoked "legislative privilege" to prevent plaintiffs from obtaining evidence about some of the events that preceded enactment of the racial gerrymander by the General Assembly.[43] *See* Wigmore, *supra,* § 2486. Under such circumstances, relieving the defendants of the burden of persuasion as to "compelling State interest" and "narrow tailoring" is inconsistent with "strict scrutiny".[44]

When the redistricting plan was enacted by the General Assembly in January 1992, it lacked census

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43 For example, when defendant Daniel Blue, the Speaker of the House, who had been active in the redistricting process, was deposed by plaintiffs, he invoked legislative privilege. When the plaintiffs subpoenaed former Assistant Attorney General John Dunne to take his deposition, the United States -- an ally of the defendants -- moved to quash the subpoena; and he never testified.

44 In *Shaw,* the Court commented that the State must have a "strong basis in evidence for [concluding] that remedial action [is] necessary". 113 S.Ct. 2832. This comment is inconsistent with allowing the burden of persuasion to be placed on plaintiffs except to show that the legislature purposefully created race-based districts which violate sound redistricting practices.

socioeconomic data which only became available a year later. Therefore, apart from data as to the racial composition of census blocks, the legislature had no basis for drawing the exceptionally contorted district lines detailed in Chapter 7 (App.J.S. 169a-240a). For the majority to attribute a benign purpose to the drawing of these lines is a "post hoc rationalization" -- correctly criticized in *Hays I*, *supra*. Under these circumstances it is "contrary to precedent as well as to sound principles of constitutional adjudication for the courts to base their analyses on purposes never conceived by the lawmakers". *See. Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 682 (1981) (Brennan, J. concurring in result).[45]

CONCLUSION

The majority opinion in the court below is at odds with the clear meaning of the Court's milestone opinion in *Shaw*. Accordingly, this Court should either summarily reverse the judgment of the court below, or should note probable jurisdiction of this appeal.

Respectfully submitted.

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45 In their zeal to sustain the redistricting plan by finding a benign legislative intent,, the majority below made numerous findings which have no evidence for support or are contrary to the overwhelming weight of the evidence.

APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(a) Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;

(b) the Fifteenth Amendment to the constitution of the United States, which provides in pertinent part:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

(c) Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 which provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by a state or political subdivision in a manner which results in a denial or abridgement of the right to vote on account of race or color, or in contravention of the

guarantees set forth in section 4 (f) (2), as provided in subsection (b)

(b) A violation of subsection (a) is established if, based on the totality of circumstances it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a), and that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the state or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(d) Section 5 of the Voting Rights Act, 42 U. S.C. § 1973c which provides:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions

> set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race of color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure; *Provided*, That such qualifications, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other

appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

94 923 NOV 21 1994

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Nos.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-____

RUTH O. SHAW, *et al.*,

Appellants,

v.

JAMES B. HUNT, JR., *et al,*

Appellees,

and

RALPH GINGLES, *et al.*

Appellees.

No. 94-____

JAMES ARTHUR "ART" POPE, *et al.*,

Appellants,

v.

JAMES B. HUNT, JR., *et al,*

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Appeal from the United States District Court
Eastern District of North Carolina, Raleigh Division

APPENDIX TO JURISDICTIONAL STATEMENTS

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

JUDGMENT IN A CIVIL CASE
No. 92-202-CIV-5-BR

[FILED
AUG 1 1994
DAVID W. DANIEL, CLERK
U.S. DISTRICT COURT
E. DIST. NO. CAR.]

RUTH O. SHAW, MELVIN G. SHIMM, ROBINSON O. EVERETT, JAMES M. EVERETT, and DOROTHY G. BULLOCK,

Plaintiffs,

and

JAMES ARTHUR "ART" POPE, BETTY S. JUSTICE, DORIS LAIL, JOYCE LAWING, NAT SWANSON, RICK WOODRUFF, J. RALPH HIXON, AUDREY McBANE, SIM A. DELAPP, JR., RICHARD S. SAHLIE and JACK HAWKE, individually,

Plaintiff-Intervenors,

v.

JAMES B. HUNT, in his official capacity as Governor of the State of North Carolina, DENNIS A. WICKER, in his official capacity as Lieutenant Governor of the State of North Carolina and President of the Senate, DANIEL T. BLUE, JR., in his official capacity as Speaker of the North Carolina House of Representatives, RUFUS L. EDMISTEN, in his official capacity as Secretary of the State of North Carolina, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, an official agency of the State of North Carolina,

EDWARD J. HIGH, in his official capacity as Chairman of the North Carolina State Board of Elections, JEAN H. NELSON, in her official capacity as a member of the North Carolina State Board of Elections, LARRY LEAKE, in his official capacity as a member of the North Carolina State Board of Elections, DOROTHY PRESSER, in her official capacity as a member of the North Carolina State Board of Elections, and JUNE K. YOUNGBLOOD, in her official capacity as a member of the North Carolina State Board of Elections,

Defendants,

and

RALPH GINGLES, VIRGINIA NEWELL, GEORGE SIMKINS, N. A. SMITH, RON LEEPER, ALFRED SMALLWOOD, DR. OSCAR BLANKS, REVEREND DAVID MOORE, ROBERT L. DAVIS, C. R. WARD, JERRY B. ADAMS, JAN VALDER, BERNARD OFFERMAN, JENNIFER McGOVERN, CHARLES LAMBETH, ELLEN EMERSON, LAVONIA ALLISON, GEORGE KNIGHT, LETO COPELEY, WOODY CONNETTE, ROBERTA WADDLE and WILLIAM M. HODGES,

Defendant-Intervenors.

For the reasons set forth in the opinion of the court filed of even date herewith, it is the judgment of the court that the challenged congressional redistricting plan does not violate any rights of the plaintiffs or their supporting intervenors. IT IS ORDERED AND ADJUDGED that this action is DISMISSED.

THIS JUDGMENT FILED AND ENTERED ON 1 AUGUST 1994 WITH COPIES TO:

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August 1, 1994

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(-s-) Jane Skinner
(By) Deputy Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No: 92-202-CIV-5-BR

[FILED
AUG 1 1994
DAVID W. DANIEL, CLERK
U.S. DISTRICT COURT
E. DIST. NO. CAR.]

RUTH O. SHAW, et al.,

Plaintiffs,

v.

GOVERNOR JAMES B. HUNT, JR.,
et al.,

Defendants.

ORDER

In filing the majority and dissenting opinions, the majority judges and the dissenting judge reserve the right to revise their respective opinions on or before 21 August 1994.

This 1st of August 1994.

FOR THE COURT

(-s-) J. Dickson Phillips, Jr.
J. DICKSON PHILLIPS, JR.
U.S. District Judge

[I certify the foregoing to be a true and correct
copy of the original.
David W. Daniel, Clerk
United States District Court
Eastern District of North Carolina

By (-s-) Jane Skinner
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 92-202-CIV-5-BR
(THREE-JUDGE DISTRICT COURT)

[FILED
AUG 22 1994
DAVID W. DANIEL, CLERK
U.S. DISTRICT COURT
E. DIST. NO. CAR.]

RUTH O. SHAW, et al.,

Plaintiffs,

v.

GOVERNOR JAMES B. HUNT, JR.,
et al.,

Defendants.

Before PHILLIPS, Senior Circuit Judge, BRITT, District Judge*, and VOORHEES, Chief District Judge**

* of the Eastern District of North Carolina
** of the Western District of North Carolina

AMENDED OPINION

Judge Phillips delivered the opinion of the Court, in which Judge Britt joined. Judge Voorhees filed an opinion concurring in part and dissenting in part.

PHILLIPS, Senior Circuit Judge:

This action, brought by several white citizens and registered voters of the State of North Carolina against various state and federal officials, challenges the constitutionality of the congressional redistricting[1] plan (the Plan) adopted by the North Carolina General Assembly following the 1990 decennial census.[2] Plaintiffs now claim principally that the General Assembly's redistricting plan violates their rights under the Equal Protection Clause of the Fourteenth Amendment, because it intentionally includes one or more congressional districts constructed along racial lines in order to assure the election of two African-American members of Congress, and is not narrowly tailored to further any compelling governmental interest. We initially dismissed that claim under Rule 12(b)(6), *Shaw v. Barr*, 808 F. Supp. 461 (E.D.N.C. 1992), but the Supreme Court reversed and remanded, *Shaw v. Reno*, ___ U.S. ___, 113 S.Ct. 2816 (1993) (*Shaw*). On remand, we find that the Plan's lines were deliberately drawn to produce one or more districts of a certain racial composition and that it is thus a "racial gerrymander" subject to strict scrutiny under *Shaw*. But we nonetheless conclude that the Plan passes constitutional muster under that standard, because it is narrowly tailored to further the state's compelling interest in complying with the Voting Rights Act. We therefore hold that the Plan does not violate the plaintiffs' Equal

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[1] Though the terms "reapportionment" and "redistricting" are often used interchangeably, *see, e.g., Hays v. Louisiana*, 839 F. Supp. 1188, 1190 n.1 (W.D.La. 1993), *vacated*, ___ U.S. ___, 114 S.Ct. 2731 (1994), we believe there is an important technical distinction between them. "Reapportionment" refers to the realineation of a finite number of seats in a legislative body among a fixed number of political subunits. "Redistricting," by contrast, refers to the process by which the lines dividing these political subunits into separate electoral districts are redrawn in response to a reapportionment. *See Garrison v. Lomax*, 540 F. Supp. 68, 72 n. 3 (D. Colo. 1982). For the sake of precision, we use the terms "redistricting" to refer to the specific legislative action under challenge here. *See Gingles v. Edmisten*, 590 F. Supp. 345, 349 n.1 (E.D.N.C. 1984) (drawing same distinction), *aff'd sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986).

[2] Jurisdiction of this three-judge district court is based on 28 U.S.C. §§ 1331, 2401, and 2284.

Protection rights in the manner alleged, and we give judgment for the defendants accordingly.

I.

General Background and Procedural History

As a result of population increases reflected in the 1990 decennial census, North Carolina became entitled to an additional seat in the United States House of Representatives, bringing its total number of seats to twelve. In July of 1991, the North Carolina General Assembly therefore enacted legislation to redistrict the state into twelve congressional districts. 1991 N.C. Sess. Laws Ch. 601. This redistricting plan included one district, the First, in which African-Americans constituted majorities of both the registered voters and the voting age population of the district. This proposed majority-minority district[3] was located in the northeastern part of the state.

Because 40 of North Carolina's 100 counties are covered by the provisions of § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c,[4] the state submitted its proposed redistricting plan to the United States Attorney General for preclearance. On December 18, 1991, the Attorney General interposed formal objection to the proposed plan, finding that the state had not met its § 5 burden of showing that the plan was free of racially discriminatory purpose.

Under § 5, the state could have challenged the Attorney General's objection to its original redistricting plan by filing a

---

[3] As used here and throughout this opinion, the term "majority-minority district" refers to an electoral district in which a majority of both the registered voters and the voting age population are members of the same racial minority.

[4] Section 5 forbids any jurisdiction within its coverage to implement any change in a "standard, practice, or procedure with respect to voting" without first obtaining federal certification that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. The jurisdiction may obtain such a certification from either the United States District Court for the District of Columbia or the United States Department of Justice. *Id.*

declaratory judgment action in the United States District Court for the District of Columbia. After debate, however, it elected not to do this, but instead to revise its original plan in order to meet the Attorney General's objection and secure his approval. In January of 1992, the General Assembly therefore convened in special session and enacted a revised redistricting plan. 1991 N.C. Extra Sess. Laws Ch. 7. This revised plan, which is the Plan under attack here, creates two districts in which African-Americans constitute majorities of both the registered voters and the voting age populations. One of these majority-minority districts, the First, is centered in the rural northeastern part of the state, where a large, dense concentration of African-Americans has long existed, but contains extensions that reach deep into the rural southeastern part of the state. The other, the Twelfth, is located not in the southern part of the state, as the Justice Department had suggested, but runs diagonally across the Piedmont in a jagged band that stretches some 160 miles from Durham to Gastonia, generally following the route of Interstate Highway 85, but with several extensions into the historic "black sections" of the Piedmont cities that lie along its course. The twelve districts created by the Plan are as equally populated as is mathematically possible,[5] but their configurations are such that a number of precincts, townships, cities and counties of the state are split among two or even three congressional districts.

The state submitted its revised Plan to the Attorney General under § 5, and the Attorney General precleared it on February 6, 1992. Almost immediately, the Republican Party of North Carolina and several individual voters associated with it filed suit in federal district court challenging the revised Plan under various provisions of the federal Constitution. Their primary claim was that the Plan violated their rights under the Equal Protection Clause of the Fourteenth Amendment, because its lines were deliberately drawn to favor Democratic incumbents at the expense of Republican political interests. On April 16, 1992, a three-judge district court dismissed that claim under Rule 12(b)(6), holding that the plaintiffs had not, and could not, allege that the Plan had the requisite discriminatory

[5] Seven of the twelve districts have a population of 552,386; the other five a population of 552,387.

effect on an identifiable political group needed to state a valid political gerrymandering claim under *Davis* v. *Bandemer*, 478 U.S. 109 (1986). *Pope* v. *Blue*, 809 F. Supp. 392 (W.D.N.C. 1992). The Supreme Court summarily affirmed. 506 U.S. ___, 113 S.Ct. 30 (Oct. 5, 1992).

Shortly after the complaint in *Pope* v. *Blue* was filed, plaintiffs herein, five white residents of Durham County, North Carolina who are registered to vote in that county, filed this action challenging the constitutionality of the same congressional redistricting plan. Named as defendants in this action were the Governor, the Board of Elections, and various high-ranking officials of the state of North Carolina (the state defendants), as well as two federal officials who had participated in the § 5 preclearance process, the United States Attorney General and the Assistant Attorney General for the Civil Rights Division (the federal defendants).

Plaintiffs' principal constitutional claim against the state defendants in this action was that the General Assembly's revised Plan violated their rights under the Equal Protection Clause. They based that claim on allegations that the Plan deliberately "creates two Congressional Districts in which a majority of African-American voters was concentrated arbitrarily -- without regard to any other considerations, such as compactness, contiguousness, geographical boundaries, or political subdivisions," with the purpose of "creat[ing] Congressional Districts along racial lines" and assuring the election of two African-American Representatives. Amended Complaint ¶ 36(A). Two theories of Equal Protection violation were advanced. First, that the deliberate drawing of district lines so as to create one or more districts in which a particular race has a majority, even if required by the Voting Rights Act, was *per se* unconstitutional under the Equal Protection Clause. Alternatively, that even if such race-based redistricting was not always unconstitutional, the specific redistricting plan at issue here was, because its lines did not observe such traditional districting considerations as geographic compactness, contiguity, and communities of interest, but were instead improperly "gerrymandered" to create two majority-minority districts and

insure proportional representation of African-American citizens in North Carolina's congressional delegation.

In addition, plaintiffs alleged that the Plan violated rights secured to them by §§ 2 and 4 of Article I of the Constitution, the Privileges and Immunities Clause of the Fourteenth Amendment, and the Fifteenth Amendment. Finally, they made a two-pronged attack on the constitutionality of the federal defendants' conduct in refusing to preclear a congressional redistricting plan for North Carolina that did not contain two majority-minority districts, arguing both that the federal defendants had misinterpreted amended § 2 of the Voting Rights Act and in consequence applied it unconstitutionally, and, in the alternative, that if amended § 2 in fact required the creation of two majority-minority districts in North Carolina, it was itself unconstitutional.

As relief, plaintiffs sought a declaration that the Plan was unconstitutional; preliminary and permanent injunctive relief against its use by the appropriate state defendants to conduct congressional elections; a declaration that the federal defendants had acted unconstitutionally in demanding that North Carolina adopt a congressional redistricting plan with two majority-minority districts; and an injunction restraining the federal defendants from taking any action requiring North Carolina to enact such a plan.

Following designation of this three-judge court, both sets of defendants filed motions to dismiss. We dismissed the claims against the federal defendants, concluding that we lacked subject-matter jurisdiction over those claims.[6] 808 F. Supp. at 466-67

[6] We reasoned that the claims against the federal defendants were cases over which § 14(b) of the Voting Rights Act, 42 U.S.C. § 1973*l*(b), gave the United States District Court for the District of Columbia exclusive jurisdiction. 808 F. Supp. at 466-67 (majority op.); *id.* at 474 (Voorhees, C.J., concurring in relevant part). Two of us also thought that the claims against the federal defendants should be dismissed on a second, alternative ground: that they failed to state a cognizable claim for relief, because they sought judicial review of the Attorney General's preclearance decisions, which was barred by *Morris v. Gressette*, 432 U.S. 491 (1977). 808 F. Supp. at 467 (majority op.). *But see id.* at 474 (Voorhees, C.J., dissenting in relevant part) (reasoning that because we lacked subject matter jurisdiction over the claims against the federal defendants, we were without power to address those claims on the merits).

(majority op.); *id.* at 474 (Voorhees, C.J., concurring in relevant part).

By a divided vote, we dismissed the claims against the state defendants as well. We were in agreement that to the extent those claims were based on §§ 2 and 4 of Art. I and the Privileges and Immunities Clause of the Fourteenth Amendment, they failed to state a legally cognizable claim. We were also agreed that plaintiffs' Fifteenth Amendment claim was essentially subsumed within their related claim under the Equal Protection Clause of the Fourteenth Amendment, and that to the extent plaintiffs' Equal Protection claim alleged that race-based redistricting was always unconstitutional, even when it was required by the Voting Rights Act, it was foreclosed by *United Jewish Organizations, Inc.* v. *Carey*, 430 U.S. 144 (1977) (*UJO*). 808 F. Supp. at 470-72 (majority op.); *id.* at 473-74 (Voorhees, C.J., concurring in relevant part). We were divided as a court, however, on the proper disposition of plaintiffs' alternative Equal Protection claim: that even if race-based redistricting was not always unconstitutional, the specific redistricting plan at issue here was, because its lines were drawn to create two majority-minority districts and assure the election of two African-American members of Congress, without regard to such traditional districting considerations as geographical compactness, contiguity, and communities of interest.

Two of us thought *UJO* disposed of this claim as well. *Id.* at 472-73 (majority op.). We read the various opinions in *UJO* to stand for the proposition that a redistricting scheme violates the Equal Protection rights of white voters only if it is "adopted with the purpose and effect of discriminating against white voters . . . on account of their race." *Id.* at 472, *citing UJO*, 430 U.S. at 165-68 (plurality opinion); *id.* at 179-80 (Stewart, J., concurring). We concluded that plaintiffs had not alleged the requisite discriminatory purpose, because they had not alleged that the Plan was intended to disadvantage white voters – that is, to deprive them of a fair opportunity, on a state-wide basis, to participate in the political process and to elect candidates of their choice – but only to give effect to African-American voting strength in order to comply with the Voting Rights Act. *Id.* at 472-73. We also concluded that plaintiffs had not, and could not, allege the requisite discriminatory

effect, because they could not establish that the Plan unfairly diluted or canceled out white voting strength and led to proportional underrepresentation of white voters on a statewide basis. *Id.* at 473.

Judge Voorhees disagreed with this analysis. He read the plurality opinion in *UJO* to authorize the states to deliberately create majority-minority districts in order to comply with the Voting Rights Act *only* when they employ traditional districting principles such as compactness, contiguity, and communities of interest, *id.* at 475-77 (Voorhees, C.J., dissenting in relevant part), which he believed were "of constitutional dimension," *id.* at 480. The Plan's alleged failure to respect these principles, in his view, "augur[ed] a constitutionally suspect, and potentially unlawful, intent" on the part of the General Assembly sufficient to state an Equal Protection claim. *Id.* at 477.

Plaintiffs appealed our dismissal of their claims to the United States Supreme Court. In a 5-4 decision, the Court held that plaintiffs had stated a claim under the Equal Protection Clause by alleging that the General Assembly had adopted a redistricting plan that was "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification." *Shaw* v. *Reno*, ___ U.S. ___, 113 S.Ct. 2816, 2832 (1993). If this "allegation of racial gerrymandering remains uncontradicted," the Court held, "the District Court further must determine whether the North Carolina plan is narrowly tailored to further a compelling governmental interest." *Id.* at ___, 113 S.Ct. at 2832. The Court therefore reversed our dismissal of the plaintiffs' Equal Protection claim and remanded that claim to this court for further consideration. *Id.* at ___, 113 S.Ct. at 2832. The Court expressly affirmed our dismissal of the claims against the federal defendants. *Id.* at ___, 113 S.Ct. at 2823. It expressed no view on the validity of plaintiffs' claims against the state defendants under Art. 1, § 2; Art. I, § 4, the Privileges and Immunities Clause of the Fourteenth Amendment, and the Fifteenth Amendment, *id.* at ___, 113 S.Ct. at 2832, leaving our dismissal of those claims undisturbed but, because unreviewed, still open for possible reconsideration by this court or, if not reconsidered, for possible later review by that Court. In this posture of the case, our consideration has been confined on

remand to the one claim found legally viable by the Supreme Court: the claim of improper "racial gerrymandering" in violation of the Equal Protection Clause.

Following the remand of that claim for further consideration, the state defendants filed an answer to the amended complaint, in which they admitted that one of their purposes in enacting the Plan was to respond to the objections interposed by the Attorney General in the § 5 preclearance process by creating two majority-minority districts. Answer to Amended Complaint at ¶ 17; *see id.* at 6. But they contended that the Plan was not a "racial gerrymander" subject to strict scrutiny under *Shaw*, because it did not segregate voters into separate voting districts on the basis of race, but actually created integrated districts, and because its lines were the product of legitimate non-racial redistricting considerations, including compliance with constitutional "one person, one vote" requirements; the creation of communities of interest based on shared historical, social, and economic interests; and the protection of incumbents. *Id.* at 6. Alternatively, they asserted that even if the Plan was subject to strict scrutiny, it was nonetheless constitutional, because it was narrowly tailored to further the state's compelling interests in complying with the preclearance requirements of § 5 of the Voting Rights Act, avoiding a violation of § 2 of the Voting Rights Act, and eradicating the effects of past racial discrimination in the state. *Id.* at 7.

After the state defendants filed their answer, we permitted twenty-two persons registered to vote in North Carolina, both African-American and white, to intervene as defendants in support of the Plan (the defendant-intervenors). We also permitted eleven persons registered to vote as Republicans in North Carolina – including Art Pope, who had been the lead plaintiff in the earlier political gerrymandering challenge to the Plan – to intervene as plaintiffs (the plaintiff-intervenors), on the condition that they adopt as their own the amended complaint filed by the original plaintiffs.[7]

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[7] We denied motions to intervene filed by Americans for the Defense of Constitutional Rights, Inc. (ADCR), a non-profit corporation associated with the original plaintiffs; the North Carolina Republican Party; and Jack Hawke in his official capacity as Chairman of that Party.

Finally, we permitted the United States, on its motion, to appear as amicus curiae by filing briefs in support of the legal positions of the state defendants.

After approximately four months of discovery, the plaintiff-intervenors filed motions, later joined by the original plaintiffs, for a preliminary injunction against further election proceedings under the existing congressional redistricting Plan and a temporary restraining order and preliminary injunction to extend the filing period for candidates for the 1994 congressional elections. We denied both the TRO application and the motion for preliminary injunction, the latter after hearing oral argument.

Following a final pre-trial conference, trial to the three-judge court was held from March 28, 1994 through April 4, 1994, pursuant to a duly adopted pre-trial order. At trial, the parties presented, and the court received, extensive oral and documentary evidence.[5] We deferred decision pending the parties' submission of proposed findings of fact and conclusions of law, briefing, and concluding oral arguments of counsel, which we heard on April 18, 1994.

Having considered the evidence, the memoranda of law submitted by the parties, the stipulations of fact, the proposed findings and conclusions, and the oral arguments of counsel, we now make the following findings of fact and conclusions of law, pursuant to Fed. R.Civ. Proc. 52(a), prefaced by a discussion of our understanding of the governing law and its application in this context.

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[5] In order to expedite trial before the three-judge tribunal required by statute, our pre-trial order limited the fact and expert witnesses available to the parties for live testimony at trial and required that the testimony of all others be received in the form given in discovery or by written narrative statements subject to live cross-examination upon demand.

II.

General Legal Principles

We begin by setting out our understanding of the nature of the Equal Protection claim recognized by the Supreme Court in this case, to serve as a framework for our findings of fact and conclusions of law. In the process, we consider conflicting contentions of the parties respecting various aspects of the claim.

A. General Nature of the Claim

At the outset of this action, plaintiffs' Equal Protection challenge to this congressional redistricting plan took two alternative forms. First, that any state redistricting plan that deliberately creates districts of a certain racial composition necessarily violates the Equal Protection Clause, regardless of its justification. Second, that even if such race-based redistricting is not unconstitutional in all circumstances, this particular redistricting plan is, because its lines do not observe traditional districting considerations such as geographical compactness, contiguity, and communities of interest, but are improperly "gerrymandered" to create two majority-minority districts and insure proportional representation of African-American citizens in North Carolina's congressional delegation.

The Supreme Court found the first claim foreclosed by its prior precedents, at least when the legislature's purpose was to comply with the remedial requirements of the Voting Rights Act. *See* ___ U.S. at ___, 113 S.Ct. at 2824 (reaffirming that race-conscious redistricting, like other forms of race-conscious state decisionmaking, is "not always unconstitutional"). The Court found legally viable, however, plaintiffs' alternative Equal Protection claim, which it characterized as a claim that the state's redistricting plan, though facially race-neutral, was "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification." *Id.* at ___, 113 S.Ct. at 2832. It is only that Equal Protection claim which plaintiffs and their supporting intervenors now press on remand.

As we understand it, the claim is a newly recognized one in voting rights jurisprudence. Until *Shaw*, the Supreme Court had recognized only two grounds on which a redistricting plan might be subject to challenge under the Equal Protection Clause. The first, based on the "one person one vote" principle, was that its districts were not equal in population, so that the votes cast by individual voters in some districts had less weight than those cast by voters in other districts. *See Reynolds* v. *Sims*, 377 U.S. 533 (1964). The second was that though its districts were of equal population, they were drawn with the purpose and had the effect of unfairly "diluting" or canceling out the voting strength of an identified group of voters -- that is, of so diminishing their ability to influence the political process as essentially to shut them out of it, as opposed to merely making it more difficult for them to elect representatives of their choice in particular districts. *See White* v. *Regester*, 412 U.S. 755, 765-66 (1973) (racial and ethnic group); *Whitcomb* v. *Chavis*, 403 U.S. 124, 153-55 (1971) (racial group); *Davis* v. *Bandemer*, 478 U.S. 109, 131-33 (1986) (plurality opinion) (political group); *id.* at 151-52 (O'Connor, J., concurring in judgment).[9] Until *Shaw*, no majority opinion of the Supreme Court had held that a state redistricting plan that did not cause concrete, material harm to the voting strength of an identifiable group of citizens in one of these two ways could nonetheless be challenged under the Equal Protection Clause on the ground that it impermissibly took race into account in drawing district lines; the only intimations to that effect had come in separate opinions of single justices.[10] And a majority

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[9] Of course, redistricting plans whose lines were drawn with the purpose and effect of actually *denying* otherwise qualified individuals the right to vote on account of their race were subject to challenge under the *Fifteenth* Amendment, which directly proscribes the denial or abridgment of the right to vote on racial grounds. *See Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960).

[10] *See Gomillion*, 364 U.S. at 349 (Whittaker, J., concurring) (suggesting that redistricting plan whose lines were deliberately drawn to exclude voters of a particular race from a particular district might be subject to challenge under Equal Protection Clause as "an unlawful segregation of [the] races"); *Wright* v. *Rockefeller*, 376 U.S. 52, 59-67 (1964) (Douglas, J., dissenting) (suggesting that redistricting plan whose lines were deliberately drawn to concentrate voters of particular racial and ethnic groups in particular districts, while excluding them from others, was subject to challenge under the Equal Protection Clause as a form of state-sponsored segregation); *id.* at 67-74 (Goldberg, J., dissenting)

of the Supreme Court had squarely held that the Equal Protection Clause did not prevent a jurisdiction subject to § 5 of the Voting Rights Act from deliberately creating districts in which racial minorities were a majority, so long as it did so with the purpose of complying with the Voting Rights Act and did not unfairly dilute or cancel out the voting strength of any other racial group. *UJO* v. *Carey*, 430 U.S. 144, 161-68 (1977) (plurality opinion); *id.* at 179-80 (Stewart, J., concurring in the judgment); *see also Metro Broadcasting Inc.* v. *FCC*, 497 U.S. 547, 584 (1990) ("a State subject to § 5 of the Voting Rights Act ... may 'deliberately creat[e] or preserv[e] black majorities in particular districts in order to ensure that its reapportionment plan complies with [the Voting Rights Act]") (*quoting UJO*, 430 U.S. at 161)).

The Supreme Court's decision in *Shaw* has now recognized a third way, characterized by the Court as analytically distinct from the two earlier recognized, in which a state redistricting plan might offend the Equal Protection Clause. It is that the plan was designed "to separate voters into different districts on the basis of race," without "sufficient justification." *Shaw*, ___ U.S. at ___, 113 S.Ct. at 2828. Such race-based redistricting legislation, said the Court, presents the same dangers as any other state law that deliberately classifies citizens by race: it threatens "to stigmatize individuals by reason of their membership in a racial group," "to incite racial hostilit[ies]," and "to stimulate our society's latent race-consciousness." *Id.* at ___, 113 S.Ct. at 2824-25 (internal quotations omitted). It should therefore be subject to "the same close scrutiny that we give other state laws that classify citizens by race," *id.* at ___, 113 S.Ct. at 2825; that is, be upheld only if "narrowly tailored to further a compelling governmental interest." *Id.* at ___, 113 S.Ct. at 2832. The Court made clear that strict scrutiny must be applied even to those race-based redistricting schemes that purport to have been enacted with the "benign" purpose of giving effect to minority voting strength in order to comply with the Voting Rights Act, "because without [strict scrutiny], a court cannot determine whether or not the discrimination truly is 'benign.'" *Id.* at ___, 113 S.Ct. at 2830; *see*

(same); *City of Mobile* v. *Bolden*, 446 U.S. 55, 86 (1980) (Stevens, J., concurring in judgment) (same).

id. at ___, 113 S.Ct. at 2826 ("district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption"). Finally, the Court held that "a plaintiff challenging a [state redistricting] plan under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." *Id.* at ___, 113 S.Ct. at 2828. Because plaintiffs had made such an allegation in their Amended Complaint, the Court concluded, they had stated a valid Equal Protection claim.

This states our understanding of the general nature of the Equal Protection claim recognized by the Court in this case and remanded to us for trial. It is, in effect, the same basic claim that the Court has recognized in other contexts in which race-based remedial measures, or "affirmative action," undertaken by state actors have been challenged, typically by members of the majority race claiming "reverse discrimination." *See Regents of the Univ. of Calif.* v. *Bakke*, 438 U.S. 265 (1978) (admission to public institution of higher learning); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (public employment); and *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989) (government contracting).[11] That being its general nature, there remain significant problems concerning how the substantive elements and procedural incidents of such a claim are to be transposed to the unique voting rights context: specifically, the problems of standing; the nature of the showing required to trigger strict scrutiny; the allocation of the burden of proof at the strict scrutiny stage; the types of compelling state interests that might justify such race-based action; and the meaning of narrowly tailored in this context. On all of these matters, the parties are in flat disagreement. We now turn to them.

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[11] It would appear, however, that this claim, even when advanced by members of the majority race, cannot properly be referred to as one of "reverse discrimination," for it has no "reverse" aspect, but instead claims "equal" discrimination against all individuals. *See infra* at 25-27.

B. Standing

Defendant-intervenors contend that the action should be dismissed for lack of standing. They point out that the Supreme Court's decision in this case technically held only that, *as a matter of substantive Equal Protection doctrine*, plaintiffs could state a valid Equal Protection challenge to the Plan without alleging that it had the purpose and effect of diluting their group voting strength. They emphasize that the Court did not hold that plaintiffs had standing to assert such a claim, nor did it purport to relieve them from the obligation to satisfy the normal requirements for standing: a showing that they have personally suffered, or are in immediate danger of suffering, some actual "injury in fact" that is "fairly traceable" to the challenged conduct and "likely to be redressed" by the relief they seek. *See Lujan* v. *Defenders of Wildlife*, 504 U.S. ___, ___, 112 S.Ct. 2130, 2136 (1992). And they argue that piaintiffs have now failed to prove that the Plan has caused them the sort of "injury in fact" required to give them standing to challenge it. They concede that the clear implication, if not the actual holding, of the Supreme Court's decision is that plaintiffs need not show that the Plan has caused injury to their *voting strength*. But they read the Court's discussion of the other ways in which race-based districting legislation can injure voters, ___ U.S. at ___, 113 S.Ct. at 2827-28, as implying that a voter has standing to challenge such legislation only if he can show that it has actually injured his political interests in one of two other ways: (i) by causing the representative elected from his district to represent only the interests of a particular racial group of which he is not a member; or (ii) by exacerbating existing patterns of racial bloc voting by a racial group of which he is not a member. While they concede that the Supreme Court's decision can be read to hold that plaintiffs had sufficiently *alleged* one or both of these injuries to establish standing for purposes of Rule 12(b)(6), they say it cannot be read to foreclose the possibility that this action might yet be dismissed for lack of standing, should plaintiffs fail to prove those allegations at trial. *See Lujan*, 504 U.S. at ___, 112 S.Ct. at 2136-37 (while generalized allegations of injury resulting from the challenged conduct may be adequate to establish standing at the pleading stage, when the court is obliged to accept all material allegations of the

complaint as true, they will not suffice to carry plaintiff's burden of proof on standing at trial).

Defendant-intervenors' argument is not without some force. The federal courts are not a general forum for the airing of any and all complaints a citizen may have about the way in which his government conducts its business, *Los Angeles* v. *Lyons*, 461 U.S. 95, 112 (1983), and they do not have "an unconditioned authority to determine the constitutionality of legislative or executive acts." *Valley Forge Christian College* v. *Americans United*, 454 U.S. 464, 471 (1982). An unbroken line of Supreme Court decisions establishes that a federal court may decide the merits of a constitutional challenge to a legislative act only when asked to do so by a party who has personally suffered, or is in immediate danger of suffering, some actual "injury in fact" that is "fairly traceable" to the challenged act and "likely to be redressed" by the relief he seeks. *Lujan*, 504 U.S. at ___, 112 S.Ct. at 2136; *Allen* v. *Wright*, 468 U.S. 737, 750 (1984); *Valley Forge*, 454 U.S. at 472; *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976); *Warth* v. *Seldin*, 422 U.S. 490, 498-99 (1975); *Flast* v. *Cohen*, 392 U.S. 83, 97 (1968). These three elements -- injury in fact, causation, and redressability -- are the "irreducible constitutional minimum" for standing, derived directly from the Article III case-or-controversy limitation on the federal judicial power. *Northeastern Florida Contractors* v. *Jacksonville*, ___ U.S. ___, ___, 113 S.Ct. 2297, 2301-02 (1993); *Lujan*, 504 U.S. at ___, 112 S.Ct. at 2136. As such, they are "an indispensable part of the plaintiff's case," which he must prove at trial "with the [same] manner and degree of evidence as any other matter on which [he] bears the burden of proof," *id.* at ___, 112 S.Ct. at 2136, before he is entitled to have the court rule on the merits of his claim. *See Warth*, 422 U.S. at 499; *Allen*, 468 U.S. at 750.

At first blush, it would appear that plaintiffs have not even alleged, much less proved, the sort of "injury in fact" required by this line of decisions. The Supreme Court has emphasized that such a injury must be "concrete" in both a qualitative and a temporal sense, *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990), which means that it must be both "distinct and palpable" in nature, *Warth*, 422 U.S. at 501, as opposed to "[a]bstract," *O'Shea* v. *Littleton*,

414 U.S. 488, 494 (1974), and "real and immediate," as opposed to "conjectural" or "hypothetical," *Lyons*, 461 U.S. at 101-02. *See generally Whitmore*, 495 U.S. at 155. It surely is arguable that the injuries plaintiffs allege the Plan has inflicted upon them do not satisfy these criteria. Their primary claim is that the Plan "injures" them -- as well as all other citizens, residents, and registered voters of the State of North Carolina -- because it threatens to perpetuate archaic racial stereotypes and to increase racial divisions in society. *See* Plaintiffs' Responses to Defendant-Intervenors' First Set of Interrogatories, Responses Nos. 1 and 2. In addition, the two plaintiffs who reside in districts in which African-Americans are a majority under the Plan -- Shaw and Shimm -- claim that it "injures" them in another way, by causing them to doubt the quality of their representation in Congress and making them feel "disenfranchised." *See* Shimm testimony, Tr. pp. 1084-93. All of these expressly claimed harms could be thought abstract, theoretical, and merely speculative, not concrete and palpable; all have the marks of the sort of "injury in perception" rather than "in fact," *Powers* v. *Ohio*, 499 U.S. 400, 426-27 (1991) (Scalia, J., dissenting), that the Supreme Court has previously found insufficient to confer Article III standing.

Nevertheless, as we now understand the nature of the claim, we believe the Supreme Court would hold that the plaintiffs have adequately established their standing to assert it. That claim, as indicated, is that the Plan violates the Equal Protection Clause simply because it "classifies" voters -- that is, assigns them to particular voting districts -- on the basis of their race, without sufficiently compelling justification. In other contexts, the Supreme Court has recognized that a state's use of racial classifications necessarily inflicts "stigmatic" injury, *Allen*, 468 U.S. at 755, which, though "abstract" in the sense that it cannot easily be quantified, is sufficient "injury in fact" to give any citizen who has been "personally denied equal treatment" by such a classification standing to challenge it under the Equal Protection Clause. *See Bakke*, 438 U.S. at 281 n. 14 (opinion of Powell, J., joined by four other justices) (white male applicant to state medical school has standing to challenge admission program that sets aside a certain number of places in the class for minority applicants, even though he cannot show that he would have been admitted but for that set-

aside program); *Northeastern Florida Contractors*, ___ U.S. at ___, 113 S.Ct. at 2303 (white contractors have standing to challenge municipal ordinance that sets aside a certain percentage of city contracts for minority-owned businesses, even though they cannot show that they would have been awarded a contract but for the set-aside program); *see also Heckler* v. *Mathews*, 465 U.S. 728, 739-40 (1984) (applying same standing rule in action challenging federal government's use of gender-based classification under the equal protection component of the Due Process Clause of the Fifth Amendment). On remand, plaintiffs seem to have added a claim of such "stigmatic" injury to the list of harms that they claim the Plan has inflicted upon them. *See* Plaintiffs' Post-Trial Brief at 4; Plaintiffs' Responses to Defendant-Intervenors' First Set of Interrogatories, Responses Nos. 1 and 2. Under the reasoning of *Bakke* and its progeny, this "stigmatic" injury would appear sufficient to give them standing to challenge the Plan, if they can show that they were "personally denied equal treatment" by it.

But difficulties remain, which in fairness must be recognized. It is not immediately obvious how this liberal rule of standing developed in *Bakke* and later cases challenging explicit racial classifications can be transposed to race-based districting. To date, all of the cases in which the dignitary injury resulting from a racial classification has been found sufficient to confer Article III standing have involved the use of race to *disadvantage* members of a particular racial group relative to other persons in the distribution of some governmental benefit. *Bakke* and *Northeastern Florida Contractors*, for example, involved explicit racial set-asides that prevented applicants of a certain race from being considered for a particular governmental benefit.[12] In such cases, the classification clearly subjects the members of the disfavored group to "unequal treatment," because it makes it more difficult for them to obtain the benefit in question than it is for other persons. As the Court explained, "the 'injury in fact' in an Equal Protection case of th[at] variety is the denial of equal treatment resulting from the imposition

[12] Though *Heckler* was a gender case rather than a race case, it too involved the use of a suspect classification to make it more difficult for certain otherwise qualified persons to obtain a particular government benefit. *See* 465 U.S. at 731 (Social Security benefits).

of the barrier" which denies members of one racial group the opportunity to compete for the benefit on an equal footing with members of other racial groups. *Northeastern Florida Contractors*, ___ U.S. at ___, 113 S.Ct. at 2303. But laws that assign voters to particular districts on the basis of their race, unlike racial set-asides, do not appear to subject members of any racial group to "unequal treatment" vis-a-vis any other. So long as all citizens may vote, all individual votes receive the same weight, and no racial group's voting strength is unduly diluted, all racial groups are by definition given a fair opportunity to participate in the electoral process, even if some are better positioned than others to elect representatives of their choice in particular districts. *See Shaw*, ___ U.S. at ___ & n.4, 113 S.Ct. at 2846 & n.4 (Souter, J., dissenting); *see also Whitcomb* v. *Chavis*, 403 U.S. at 153-55 (fact that redistricting scheme causes members of a particular group to suffer repeated defeats at the polls and fails to provide them with proportional representation does not mean that it denies them an "equal opportunity" to participate in the electoral process); *Davis* v. *Bandemer*, 478 U.S. at 131-32 (same).

Despite this possible awkwardness, we think the *Shaw* Court must have intended to transpose to race-based districting the expansive concept of standing to challenge racial classifications born in *Bakke* and brought to maturity in *Northeastern Florida Contractors*. The linchpin of the Court's analysis in *Shaw* was that race-based districting is no different than any other legislation that deliberately classifies citizens by race; it was on that basis that the Court held such legislation subject to strict scrutiny under the Equal Protection Clause. *See Shaw*, ___ U.S. at ___, 113 S.Ct. at 2824-25. Having equated race-based districting with legislation that explicitly classifies citizens on the basis of race for purposes of the underlying substantive law, it seems inconceivable that the Court would not also equate the two for purposes of standing, which serves merely to define the class of persons who have a sufficient personal stake in a particular substantive claim to litigate it in court. We therefore believe that the same expansive notion of standing developed in *Bakke* and other cases challenging explicit racial set-asides must also apply to cases challenging race-based districting; that is, that any person who can show that a redistricting plan has assigned him to vote in a particular district at least in part because

of his race has standing to challenge it, even if he cannot show that it has caused any concrete injury to his political interests.[13] In this context, the "injury in fact" presumably is the state's decision to deal with the voter as a member of a particular racial class, rather than as an individual, in assigning him to a voting district, which is an affront to his "personal dignity." *See J.E.B.* v. *Alabama ex rel. T.B.*, ___ U.S. ___, ___, 114 S.Ct. 1419, 1434 (1994) (Kennedy, J., concurring in the judgment); *Metro Broadcasting Inc.* v. *FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as 'individuals, not as simply components of a racial ... class'"). That race-based redistricting necessarily visits this indignity equally upon all races would appear to be of no consequence in the standing analysis, for "racial classifications do not become legitimate [because] all persons suffer them in equal degree." *Powers*, 499 U.S. at 410.

Such a broad standing principle concededly, and with all respect, has disquieting implications, which defendant-intervenors contend demonstrate its unacceptability. It would appear to mean that any person registered to vote in a jurisdiction with a districting plan that contains one or more districts which have been deliberately designed to have a certain racial composition has standing to challenge that plan, even if he is not assigned to vote in one of those

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[13] Defendant-intervenors' suggestion that plaintiffs lack standing to challenge the Plan unless they can show that it has either caused the representatives elected from their districts to represent only the interests of a particular racial group of which they are not members or exacerbated patterns of bloc voting by a racial group of which they are not members, *see supra* at 21, is effectively an effort to read back into the constitutional analysis (albeit in the guise of Article III standing, rather than substantive Equal Protection law) a *threshold* requirement that a plaintiff seeking to challenge a race-based redistricting plan demonstrate that it has caused some sort of concrete and material injury to his political interests. The *Shaw* Court expressly refused to impose such a threshold requirement as a matter of substantive Equal Protection law, and we cannot believe that it would countenance an effort to reintroduce it as a matter of standing law. We read the passage in the *Shaw* opinion upon which defendant-intervenors rely, ___ U.S. at ___, 113 S.Ct. at 2827-28, as not intended to limit the class of voters who have standing to challenge race-based districting legislation, but merely to point out some of the pernicious effects that such legislation can have, in order to explain why it should be subject to the same strict scrutiny as other laws that deliberately classify citizens by race.

districts himself.[14] And its ultimate implication, as defendant-intervenors emphasize, is that any member or members of a racial minority for whose presumed benefit a majority-minority district has been created would have standing to challenge it as an improper "racial classification," even if they cannot prove the sort of injury to their group voting strength required to make out a constitutional or statutory vote-dilution claim. *See Croson*, 488 U.S. at 494 (plurality) (all racial classifications immediately suspect under Equal Protection Clause, regardless of which race is benefitted or burdened).

Despite these difficulties, we understand *Shaw* necessarily to have implied a standing principle that accords standing to challenge a race-based redistricting plan to any voter who can show that it has assigned him to vote in a particular electoral district in part at least because of his race.

C. Proof Required to Trigger Strict Scrutiny

The threshold showing required by *Shaw* to establish that a particular districting plan is subject to strict scrutiny is not immediately clear, as the conflicting contentions of the parties illustrate.

Plaintiffs and their supporting intervenors contend that after *Shaw*, strict scrutiny applies to any districting plan in which consideration of race is shown to have played a "substantial" or "motivating" role in the line-drawing process, even if it was not the only factor that influenced that process. They note that it has long been established, outside the districting context, that strict scrutiny applies to any legislation in which a racially-discriminatory purpose is shown to have played a "substantial" or "motivating" role, even if it was not the "sole," "dominant," or even the "primary" purpose of the legislation. *Arlington Heights* v. *Metropolitan Housing Dev.*

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[14] *See* Pildes & Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating District Appearances after *Shaw* v. *Reno*, 92 Mich. L.Rev. 483, 514-515 & n. 115 (1993); Aleinikoff & Issacharoff, Race and Redistricting: Drawing Constitutional Lines after *Shaw* v. *Reno*, 92 Mich. L. Rev. 588, 642 (1993).

Corp., 429 U.S. 252, 265-66 (1977); *see Hunter* v. *Underwood*, 471 U.S. 222, 231 (1985). They contend that *Shaw* simply transposed the *Arlington Heights* "substantial" or "motivating" role test to the districting context, and that in this context, it is necessarily satisfied by proof that the lines of a particular plan were deliberately drawn so as to create one or more districts in which a particular racial group has a majority, even if factors other than race also played a substantial role in the location and shape of those districts. As they point out, this is the interpretation of *Shaw* adopted by all three members of the court in *Hays* v. *Louisiana*, 839 F. Supp. 1188 (W.D.La. 1993) (*Hays I*), *vacated*, ___ U.S. ___ , 114 S.Ct. 2731 (June 27, 1994),[15] the first three-judge court

[15] *Hays I* struck down Louisiana's then-existing congressional redistricting plan, which contained two majority-minority districts designed to comply with the Voting Rights Act, as an unconstitutional racial gerrymander under *Shaw*. While an appeal from that decision was pending before the United States Supreme Court, the Louisiana legislature repealed the invalidated plan and enacted a revised congressional redistricting plan, which redrew the two majority-minority districts so as to correct some of the problems that the district court had identified in declaring the earlier plan unconstitutional. Act 1 of the Second Extraordinary Session of the 1994 Louisiana Legislature. The *Hays* plaintiffs promptly moved to amend their complaint to add a challenge to the revised plan, and the parties filed supplemental briefs in the Supreme Court addressing the effect of the enactment of the revised plan on the pending appeal from the decision invalidating its predecessor.

Shortly thereafter, the Supreme Court issued a brief order vacating the district court decision in *Hays I*. ___ U.S.___, 114 S.Ct. 2731 (June 27, 1994). Though the State argued to the Court that the enactment of the revised plan rendered the appeal from the decision invalidating its predecessor moot, and that the Court should therefore vacate that decision under *United States* v. *Munsingwear*, 340 U.S. 36 (1950), the Court's order did not make clear that it was basing its decision to vacate on that ground. The order stated that "[t]he judgment [below] is vacated and the case is remanded to the United States District Court . . . for further consideration in light of Act 1 of the Second Extraordinary Session of the 1994 Louisiana Legislature and the parties' filings in this Court concerning Act 1," *id.* at ___ , 114 S.Ct. at 2731, which is not the language the Court normally uses when vacating a lower court decision under *Munsingwear*. *See, e.g.*, *Gantt* v. *Skelos*, ___ U.S. ___ , 113 S.Ct. 30 (1992) (direct appeal from three-judge district court in Voting Rights Act case) ("The judgment is vacated and the case is remanded to the United States District Court ... with instructions to dismiss the appeal as moot. *United States* v. *Munsingwear*, 340 U.S. 36 (1950)."); *Yellow Freight System Inc.* v. *United States*, ___ U.S. ___ , 113 S.Ct. 31 (1992) (petition for certiorari from United States Court of Appeals) ("The judgment is vacated and the case is remanded to

to consider a *Shaw*-like challenge to a race-based redistricting plan in the aftermath of the Supreme Court's decision here. *See id.* at 1202 & n. 46 (majority op.) (under *Shaw*, strict scrutiny is triggered by proof that race was an "important" or "significant[ ]" factor in the line-drawing process, even if it was not the *only* factor that influenced that process); *id.* at 1216 (Walter, J., concurring) (strict scrutiny applies if race was "a motivating factor" in the line-drawing process); *Jeffers* v. *Tucker*, 847 F. Supp. 655, 671-72 (E.D.Ark. 1994) (Eisele, J., concurring) (same).

The state and its allies, by contrast, argue that mere proof that the legislature deliberately drew district lines in order to create one or more districts in which a particular racial group has a majority is not sufficient to trigger strict scrutiny under *Shaw*. Instead, they read *Shaw* as holding that strict scrutiny applies only to plans that are shown to (i) create districts with highly irregular shapes; (ii) in which citizens of particular racial groups are concentrated in numbers disproportionate to their representation in the state's population as a whole; and (iii) whose shape and location cannot rationally be explained by reference to any districting factor other than race. While they concede that proof of the first two factors may give rise to an *inference* that a plan is a "racial gerrymander" triggering strict scrutiny, they maintain that the state may rebut that inference by presenting evidence that the location and shape of the districts can rationally be explained by reference to some districting principle other than race, and that if the state does

the United States Court of Appeals ... with directions to dismiss as moot."). For this reason, the order of vacation could be read to indicate some doubt about the validity of the *Hays I* court's rulings on the merits.

On remand, the district court permitted the *Hays* plaintiffs to amend their complaint to challenge the constitutionality of the revised plan, and then ruled that it too was unconstitutional under *Shaw*. *Hays* v. *Louisiana*, No. 92-1522 (W.D.La. Aug. 1, 1994) (*Hays II*). The court's brief opinion explaining this ruling stated that it continued to adhere to the interpretation of *Shaw* set forth in its *Hays I* opinion, notwithstanding the uncertainty about the validity of that interpretation after the Supreme Court's action, and that it was adopting by reference the constitutional analysis set forth in that earlier opinion. *Id.* at ___ (slip op. at 2). Because *Hays II* does not reiterate that analysis in any detail, but simply incorporates by reference the discussion in *Hays I*, we continue to cite to *Hays I* here.

this, strict scrutiny does not apply and the plan must be judged instead under the lenient rational basis test. In their view, the *Shaw* Court was concerned not about *all* deliberate use of race in redistricting, but only about a narrow category of "exceptional cases" in which race-based redistricting produces majority-minority districts so peculiar-looking that they call attention to their racial purpose and thereby serve to exacerbate, rather than to alleviate, the existing racial divisions in society.

It is certainly possible to read the majority opinion in *Shaw* as holding no more than the state and its allies say it does. *See Dewitt* v. *Wilson*, No. Civ.-5-93-535-EJG/JFM, 1994 WL 325415, at * 3-7 (E.D.Cal. June 27, 1994) (adopting this reading of *Shaw*). As they point out, the plaintiffs' reading of *Shaw* is hard to square with the nature of the Supreme Court's remand in this case. It was clear, on the record before the Court, that the desire to create two districts in which African-Americans were a majority of voting age population was indeed a substantial motivating factor behind the enactment of this particular plan. Our opinion below had indicated that the state had conceded this fact in the proceedings before us, 808 F. Supp. at 470, and several of the dissents in the Supreme Court called this concession to the majority's attention. *See* ___ U.S. at ___, 113 S.Ct. at 2838 (White, J., dissenting); *id.* at ___, 113 S.Ct. at 2843 (Stevens, J., dissenting). If the deliberate creation of majority-minority districts was all that it took to trigger strict scrutiny, the most logical thing for the Court to have done would have been to note the state's concession, announce that strict scrutiny was therefore applicable, and remand for application of that standard, since the factual record at that stage was not sufficiently well-developed to allow the Court to do so itself. But the Court did not do this; instead, it held only that plaintiffs' allegations were sufficient to state a claim that the Plan was a racial gerrymander subject to strict scrutiny, *id.* at ___, 113 S.Ct. at 2832, and it suggested several times that the state might yet avoid strict scrutiny on remand, by producing evidence that would somehow "rebut" or "contradict" that allegation of racial gerrymandering. *Id.* at ___, 113 S.Ct. at 2832 ("If the allegation of racial gerrymandering remains uncontradicted, the District Court further must determine whether the North Carolina plan is narrowly tailored to further a compelling governmental interest"); *id.* at ___,

113 S.Ct. at 2830 ("[I]f appellants' allegations of a racial gerrymander are not contradicted on remand, the District Court must determine whether the General Assembly's reapportionment plan satisfies strict scrutiny"). In addition, the majority explicitly reserved the question whether the deliberate creation of majority-minority districts, without more, always triggers strict scrutiny, *id.* at ___, 113 S.Ct. at 2828 ("[W]e express no view as to whether 'the intentional creation of majority-minority districts, without more,' always gives rise to an equal protection claim"). For these reasons, the state's reading of *Shaw* cannot be rejected out of hand.

Despite its surface plausibility, however, we do not think the state's interpretation of *Shaw* can be correct. If *Shaw* meant no more than the state says it does, it would have precious little practical effect on race-based districting, for it would require states to defend the deliberate creation of majority-minority districts under strict scrutiny *only* when they could not come up with any rational explanation for the location and shape of those districts other than race. This would seldom be the case, given the wide variety of other districting principles that may be used to justify even the most peculiar-looking districts. The language and structure of the Court's opinion, if not its actual holding, strongly suggest that the Court intended to do much more than this. As we read the opinion, it was intended to place race-based redistricting legislation into the same category as all other forms of race-based state action after *Croson*, for purposes of analysis under the Equal Protection Clause: subject to strict scrutiny upon a showing that the state's use of race to distinguish among citizens was deliberate, whether or not it can be said to have had a "benign" or "remedial" purpose. There are admittedly some problems with this reading, though, which the state defendants and their allies properly point out. We therefore analyze the relevant portions of the Court's opinion in some detail.

The whole thrust of the Court's description of the remanded claim is to locate it within post-*Croson* "color-blind" Equal Protection jurisprudence, in which strict scrutiny is triggered simply by the fact that legislation "classifies" citizens by race -- whatever its asserted purpose, however its presumed benefits and burdens are cast, and whether the racial classification is overt or implicit. The Court begins with a textbook exposition of the basic premises and

precepts of that jurisprudence: The "central purpose" of the Equal Protection Clause is "to prevent the States from purposefully discriminating between individuals on the basis of [their] race." ___ U.S. at ___, 113 S.Ct. at 2824. Laws that deliberately distinguish between citizens on the basis of their race are "odious to a free people whose institutions are founded upon the doctrine of equality," because they "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Id.* at ___, 113 S.Ct. at 2824 (internal quotations omitted). [16] They must therefore be subject to the strictest judicial scrutiny, even when claimed to have a "benign" or "remedial" purpose, for "'[a]bsent searching judicial inquiry ..., there is simply no way of determining wh[ich] [racial] classifications are "benign" or "remedial" and wh[ich] are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.'" *Id.* at ___, 113 S.Ct. at 2824 (*quoting Croson*, 488 U.S. at 493 (plurality)). This strict scrutiny applies not only to legislation that is overtly race-based -- that is, that draws "explicit racial distinctions" on its face, as did the minority set-aside policy in *Croson* -- but also to legislation that employs a classification which, though facially race-neutral, is shown to be "'an obvious pretext for racial discrimination.'" *Id.* at ___, 113 S.Ct. at 2825. And one way to prove that a facially race-neutral law is in fact a pretext for racial discrimination is to show that it draws distinctions that are "'unexplainable on grounds other than race.'" Id. at ___, 113 S.Ct. at 2825.

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[16] Throughout its opinion, the Court seems to be using the term "racial discrimination" to mean simply deliberately *distinguishing* between people on the basis of their race, without regard to whether the distinction results in *disadvantageous treatment* of one racial group vis-a-vis another. *See id.* at ___, 113 S.Ct. at 2824-26 (using "discriminating" and "distinguishing" interchangeably). This is consistent with the Court's general shift, in recent years, from the "anti-discrimination" model of the Equal Protection Clause, under which strict scrutiny was warranted only when race was used to single out historically-disadvantaged minority groups for further adverse treatment, to the more individualistic "colorblind" model, under which any deliberate use of race to distinguish between citizens triggers strict scrutiny, regardless of whom it benefits or burdens, because race is presumptively irrelevant to legitimate governmental decisionmaking. *See generally* Klarman, An Interpretive History of Modern Equal Protection, 90 Mich. L.Rev. 213, 308-16 (1991).

The Court then turns to a discussion of how these principles apply in the context of electoral districting. *Id.* at ___, 113 S.Ct. at 2825-28. It begins by stating that "district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause, regardless of the motivations underlying their adoption." *Id.* at ___, 113 S.Ct. at 2826. It observes that it is normally difficult to prove that a single-member districting plan "purposefully distinguishes between voters on the basis of race," because such plans "typically do[ ] not classify persons at all," but "tracts of land, or addresses," and there are many legitimate non-racial reasons why a legislature might choose to construct districts in a way that concentrated members of a particular racial group in one or more of them. *Id.* at ___, 113 S.Ct. at 2826. But it says there are a handful of "exceptional cases" in which proving that a redistricting plan "purposefully distinguishes between voters on the basis of race," hence is subject to strict scrutiny, "will not be difficult at all": those in which the plan contains district lines "so highly irregular" that they "rationally cannot be understood as anything other than an effort to 'segregat[e] ... voters' on the basis of race." *Id.* at ___, 113 S.Ct. at 2826. Two examples of plans that fall into this category are given: the actual plan in *Gomillion*, in which "a tortured municipal boundary line was drawn to exclude black voters," and a hypothetical plan that "concentrate[s] a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions." *Id.* at ___, 113 S.Ct. at 2826-27. In such cases, the Court explains, the irregular shape of the districts serves as powerful circumstantial evidence that the legislature was in fact motivated by a racial purpose when it drew them. *See id.* at ___, 113 S.Ct. at 2827 (the legislature's failure to observe "traditional districting principles" is "objective" evidence that the districts were "gerrymandered on racial lines"); *id.* at ___, 113 S.Ct. at 2827 ("'dramatically irregular shapes may have sufficient probative force to call for an explanation'") (quoting *Karcher* v. *Daggett*, 462 U.S. 725, 755 (1983) (Stevens, J., concurring)).[17]

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[17] As the *Hays I* Court recognized, the *Shaw* majority apparently uses the term "racial gerrymander" to refer to districting legislation which, though race-neutral on its face, is in fact deliberately designed to produce one or more districts of a certain racial composition, so that it can be said to reflect a deliberate policy of

We think it readily apparent from the Court's analysis that what it finds potentially offensive about the Plan under challenge here -- from a constitutional standpoint -- is not that it is aesthetically "ugly," but that its drafters may deliberately, and unjustifiably, have taken race into account in assigning voters to particular districts. *See* ___ U.S. at ___, 113 S.Ct. at 2832 ("race-based districting by our state legislatures," like "[r]acial classifications of any sort," must be subject to "close judicial scrutiny," because it "reinforce[s] the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," and threatens to "balkanize us into competing

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assigning citizens to voting districts on the basis of their race. *Hays I*, 839 F. Supp. at 1194 (majority op.) (defining a "racial gerrymander" under *Shaw* as a districting plan that "intentionally draws one or more districts along racial lines or otherwise intentionally segregates citizens into voting districts based on their race"); *id.* at 1214 (Walter, J., concurring) (defining a "racial gerrymander" under *Shaw* as "[districting] legislation that manipulates district lines to achieve a predetermined racial result"). This focus on deliberate manipulation of district lines to achieve an ulterior purpose is consistent with the traditional understanding of a "gerrymander." *See Black's Law Dictionary* at 618 (5th ed. 1979) (defining "gerrymandering" as "the process of dividing a state or other territory into the authorized ... political divisions, but with such a geographical arrangement as to accomplish an ulterior or unlawful purpose, as, for instance, to secure a majority for a given political party in districts where the result would be otherwise if they were divided according to obvious natural lines").

In its most extreme form, a "racial gerrymander" may result in districts that actually "segregate" or "separate" the races for voting purposes – the sort of redistricting plan that the *Shaw* majority characterizes as "political apartheid." *Shaw*, U.S. at ___, 113 S.Ct at 2827. But it need not be this extreme to trigger strict scrutiny; neither *Gomillion* nor *Wright* – upon which the *Shaw* majority relies in reaching its conclusion that race-based redistricting plans are subject to strict scrutiny, and from which it draws the language about "segregating" voters by race – involved plans that *completely* separated the races for purposes of voting. *See Gomillion*, 364 U.S. at 341 (redistricting plan removed from particular electoral district all but "four or five" out of 400 voters of a particular racial minority); *Wright*, 376 U.S. at 59 (Douglas, J., dissenting) (redistricting plan resulted in "substantial, though not complete, segregation [of voters] by race"). The critical feature of a racial gerrymander is not that it completely separates the races for purposes of voting, but that it reflects the deliberate manipulation of district lines so as to accomplish a particular racial result. *See Shaw*, ___ U.S. at ___, 113 S.Ct. at 2823 (describing a "racial gerrymander" as "the deliberate and arbitrary distortion of district boundaries ... for [racial] purposes") (internal citations omitted).

racial factions"). The peculiar, "bizarre," or "ugly" shapes of its districts has some significance in the constitutional analysis at this stage, but only as circumstantial evidence that the disproportionate concentration of members of a particular race in certain districts was something the line-drawers deliberately set about to accomplish, as opposed to being simply an accidental consequence of a line-drawing process driven by other districting concerns. *See id.* at ___, 113 S.Ct. at 2827.

The necessary implication of this analysis is that strict scrutiny of an electoral redistricting plan is now triggered by proof -- by any means, including state concession, bizarre shape, or some combination of the various factors typically used to prove the "intent" element of an Equal Protection claim under *Arlington Heights* -- that racial considerations played a "substantial" or "motivating" role in the line-drawing process, even if they were not the only factor that influenced that process. *See Hays I*, 839 F. Supp. at 1202 & n. 46 (majority op.); *id.* at 1216 (Walter, J., concurring); *Jeffers*, 847 F.Supp, at 671-72 (Eisele, J., concurring). This "race-a-motivating-factor" triggering test is necessarily met by proof that the plan's lines were deliberately drawn so as to create one or more districts in which a particular racial group is a majority, even if factors other than race are shown to have played a significant role in the precise location and shape of those districts. If the line-drawing process is shown to have been infected by such a deliberate racial purpose, strict scrutiny cannot be avoided simply by demonstrating that the shape and location of the districts can rationally be explained by reference to some districting principle other than race, for the intentional classification of voters by race, though perhaps disguised, is still likely to reflect the "impermissible racial stereotypes," *Shaw*, ___ U.S. at ___, 113 S.Ct. at 2827, "'illegitimate notions of racial inferiority'" and "'simple racial politics,'" *id.* at ___, 113 S.Ct. at 2824, that strict scrutiny is designed to "'smoke out.'" *Croson*, 488 U.S. at 493 (plurality).[18]

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[18] Of course, if a legislature could show that it would have enacted precisely the same plan even if it had not considered race at all, then it ought to be able to avoid strict scrutiny. *See Arlington Heights*, 429 U.S. at 270-71 n. 21; *Mt. Healthy City School Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977). But that would be a rare case indeed.

This is the obvious implication of the *Shaw* majority's effort to import post-*Croson* Equal Protection principles into the electoral districting context, *see* Aleinikoff & Tsaacharoff, *supra*, at 664-43, and it is the reading of *Shaw* most consistent with the views on Equal Protection expressed by the members of the *Shaw* majority in their various opinions in *Wygant*, *Croson*, and *Metro Broadcasting*.[19] *See also Johnson* v. *DeGrandy*, ____ U.S. ___, ___, 62 U.S.L.W. 4755, 4764-65 (June 30, 1994) (Kennedy, J. concurring in part and concurring in the judgment) (reading *Shaw* as applying "to the drawing of electoral and political boundaries" the *Croson* principle that "the sorting of persons with an intent to divide by reason of race raises the most serious constitutional questions," triggering strict scrutiny under the Equal Protection Clause regardless of the race of those burdened or benefited by it, and therefore admonishing "state and federal officials with responsibilities related to redistricting, as well as reviewing courts, to recognize that explicit race-based districting ... must comply with the overriding demands of the Equal Protection Clause"). But, the state defendants and their allies fairly ask, if the Court intended the deliberate creation of majority-minority districts, standing alone, to trigger strict scrutiny, why did it not rest its remand simply on that ground, as it easily could have done here, given the state's concession? Why did it deliberately reserve the question whether the deliberate creation of majority-minority districts, without more, will always give rise to an Equal Protection claim, and write an opinion that can be read to confine strict scrutiny to cases in which the lines cannot rationally be explained on any ground other than race?

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[19] *See, e.g., Wygant*, 476 U.S. at 284-85 (O'Connor, J., concurring in part and concurring in the judgment) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination'") (quoting *Bakke*, 438 U.S. at 291 (opinion of Powell, J.); *Croson*, 488 U.S. at 493-94 (opinion of O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.); *id.* at 518 (Kennedy, J., concurring in part and concurring in the judgment) ("The moral imperative of racial neutrality is the driving force of the Equal Protection Clause"); *id.* at 520 (Scalia, J., concurring in the judgment) ("to classify and judge men and women on the basis of ... the color of their skin" is "fatal to a Nation such as ours"); *Metro Broadcasting*, 497 U.S. at 602-10 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting); *id.* at 631-38 (Kennedy, J., joined by Scalia, J., dissenting).

The question is by no means easily answered, but we think there must be an answer that does not undercut our previously-stated understanding of *Shaw*. Several can be ventured. First, a broad holding that strict scrutiny applies to any plan that deliberately creates majority-minority districts, even when those districts are not highly irregular, would have required the Court to overrule its earlier decision in *UJO*. By confining its discussion to bizarre-looking districts, the Court was able to distinguish *UJO* as involving a majority-minority district of relatively normal shape. *See* ___ U.S. at ___, 113 S.Ct. at 2829. Second, the Court may have thought it unfair to hold the State of North Carolina, which had not yet even filed an answer in this action, to a concession it made in response to a Rule 12(b)(6) motion at a time when it had fair reason to believe that *UJO*, under which the concession would have made no difference, was still the controlling authority. Finally, the Court may have viewed the concession made by the state here as an aberration that was unlikely to occur in the vast majority of cases, and ignored it in order to announce a rule that would permit plaintiffs making comparable claims to prove the "intentional" use of race necessary to trigger strict scrutiny inferentially, when the state did not concede it. In any event, we have no need to identify the exact reason for this action by the Court; it suffices here simply to demonstrate that the state has not identified the only possible reason.

Before leaving this point, we also need, in fairness, to consider one other objection that the state and its allies raise to the reading of *Shaw* suggested by plaintiffs and their supporting intervenors: that it will require virtually *all* redistricting plans to be defended under strict scrutiny, since it is almost always possible to show that a legislature was *aware* to some degree of the racial impact of the lines it was drawing, particularly now that all redistricting is done with computers into which racial data is loaded. *See Shaw*, ___ U.S. at ___, 113 S.Ct. at 2826 ("redistricting differs from other kinds of state decisionmaking in that the legislature always is aware of race when it draws district lines, just as it is *aware* of age, economic status, religious and political persuasion, and a variety of other demographic factors") (emphasis in original).

We do not believe any such drastic consequence will result from our reading of *Shaw*. The Supreme Court's Equal Protection cases have long recognized that there is a critical distinction between "race-conscious" action and "race-based" action, and that the "intentional" use of race required to trigger strict scrutiny of legislative action cannot be established simply by showing that the legislature adopted a particular course of action with knowledge that it was likely to have a particular racial impact. *See Personnel Adm. of Mass.* v. *Feeney*, 442 U.S. 256, 279 (1979) (the sort of "discriminatory purpose" required to trigger strict scrutiny of a facially-neutral statute "implies more than intent as volition or intent as awareness of consequences"; it requires a showing "that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group"). The *Shaw* majority specifically stated that the "intentional" or "deliberate" use of race required to trigger strict scrutiny in the redistricting context, as elsewhere, means not just taking action with knowledge or awareness that it is likely to have a particular racial impact, but taking it with the *specific intent* to bring about such an impact. *See* ___ U.S. at ___, 113 S. Ct. at 2826 (noting that "the legislature *always* is aware of race when it draws district lines," but that "[t]hat sort of race consciousness does not lead inevitably to impermissible race discrimination") (emphasis in original). Properly applied, this distinction between "race-conscious" and "race-based" districting should prevent legislatures from having to defend all districting plans under the strict scrutiny standard.[20]

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[20] As a practical matter, there will probably be only two types of redistricting cases in which plaintiffs will consistently be able to prove the intent necessary to trigger strict scrutiny: (i) those in which a redistricting plan creates more majority-minority districts than did the prior plan, and there is direct evidence that this has been done in response to either a private suit under the Voting Rights Act or a § 5 objection from the Justice Department; and (ii) those in which a plan creates one or more districts in which citizens of a particular racial group are concentrated in numbers disproportionate to their representation in the state's population as a whole, whose shapes are so highly irregular as to give rise to an inference that the concentration was something the legislature affirmatively set out to achieve, as opposed to being merely an accidental side-effect of a redistricting process in which racial considerations played no role.

In all other situations, proof of the requisite intent will be difficult indeed, since redistricting legislation is almost always facially race-neutral and

Nor will our reading of *Shaw* condemn to constitutional invalidity all majority-minority districts drawn to give effect to minority voting strength in order to comply with the requirements of the Voting Rights Act. As the cases involving affirmative action in higher education and public employment demonstrate, although strict scrutiny places significant limitations on the ability of state actors to take race-based remedial action, it need not be "strict in theory, fatal in fact." *Fullilove* v. *Klutznick*, 448 U.S. 448, 518-19 (1980). Application of strict scrutiny to all redistricting proven to be race-based will certainly make state legislatures look before they leap when it comes to voluntary compliance with the Voting Rights Act. But it should not prevent them from attempting to comply with it altogether, so long as the "narrowly tailored to further a compelling state interest" standard is applied in a way that is sensitive not only to the state legislatures' statutory obligation to create majority-minority districts to give effect to minority voting strength in areas where minorities have been subjected to persistent discrimination in the political process, but also to the special compromises that they must make in order to pass plans that draw such districts.

With that in mind, we turn now to the problems of how, under *Shaw*, strict scrutiny is to be applied in the redistricting context.

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proving the intent of a collective body like a legislature, which is notoriously difficult in the best of circumstances, is even more difficult when it is engaged in the highly political "horse-trading" that marks the redistricting process. *See Shaw*, ___ U.S. at ___, 113 S.Ct. at 2826; *see also Wright*, 376 U.S. at 53-58 (finding that plaintiffs failed to prove that legislature was motivated by racial considerations when it drew congressional redistricting plan in which members of particular racial and ethnic minorities were concentrated in a single district in numbers disproportionate to their representation in the population as a whole, where that concentration could be explained by reference to existing patterns of residential segregation).

D. Application of The Strict Scrutiny Standard in the Redistricting Context

Shaw holds that any deliberately race-based state redistricting plan is subject to "strict scrutiny" under the Equal Protection Clause, and that it can survive that scrutiny only if its use of race is both justified by a "compelling governmental interest" and "narrowly tailored" to further that interest. ___ U.S. at ___, 113 S.Ct. at 2832. But while *Shaw* offers some brief suggestions about what this standard might require in the redistricting context, *see id.* at ___ , 113 S.Ct. at 2830-32, it does not actually apply it to this particular redistricting plan. Nor has any other decision of the Supreme Court ever applied strict scrutiny under the Equal Protection Clause to specific electoral redistricting legislation. In seeking to understand how that is to be done here, we must look for guidance primarily to the Court's decisions applying the strict scrutiny standard to race-based remedial measures voluntarily undertaken by state actors in other contexts: higher education, employment, and government contracting. *See Regents of the Univ. of Calif.* v. *Bakke*, 438 U.S. 265 (1978); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986), and *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989).[21]

Here again, we confront the problem of transposing to the redistricting context a legal standard developed in very different factual contexts. There are difficulties -- again emphasized by the parties' conflicting contentions -- arising from the fact that race-based electoral redistricting differs, in several critical respects, from

[21] In our view, a race-based redistricting plan enacted by a state, even under pressure from the Justice Department, is most closely analogous to an affirmative action plan voluntarily adopted by a state actor, for purposes of analysis under the Equal Protection Clause. By contrast, a race-based redistricting plan imposed upon a state by a federal court as a remedy for a found violation of federal law is analogous to a judicially-imposed affirmative action plan, which may require greater justification at the compelling interest stage of the strict scrutiny analysis than its voluntarily-adopted counterpart. *See United States* v. *Paradise*, 480 U.S. 149, 187 n. 2 (1987) (Powell, J., concurring). *Cf. Voinovich* v. *Quilter*, ___ U.S. ___, ___, 113 S.Ct. 1149, 1156-57 (1993) (noting that a state legislature's power to create majority-minority districts voluntarily is considerably broader than a federal court's power to order it to do so).

the race-based remedial measures which the Court has previously analyzed under the strict scrutiny standard. First, and most critically, unlike the use of racial preferences in educational admissions, employment, and government contracting, the drawing of district lines so as to give effect to minority voting strength is specifically mandated by a federal statute enacted by Congress under its broad constitutional authority to remedy the effects of past discrimination.[22] Second, unlike discrimination in education,

[22] The United States as *amici* suggests that the redistricting plan at issue here should be judged under the intermediate scrutiny standard applied to "benign" race-based measures mandated by Congress in *Metro Broadcasting* v. *Federal Communications Comm'n*, 497 U.S. 547 (1990) ("substantially related" to the achievement of an "important" governmental interest that is within the scope of Congress' legislative power), rather than the more exacting strict scrutiny standard generally applied to such measures when they are undertaken by state and local governments. The argument is apparently that because the Plan was enacted in direct response to a § 5 objection from the United States Justice Department, to whom Congress has delegated authority to enforce the Voting Rights Act, and was later approved by the Justice Department in the § 5 preclearance process, it was "mandated by Congress" in the same sense as the minority-preference policies adopted and maintained by the FCC in *Metro Broadcasting* and thus should be evaluated under the more forgiving intermediate scrutiny standard announced in that case.

We disagree. Even if *Metro Broadcasting*'s holding that race-based affirmative action programs mandated by Congress are not subject to strict scrutiny survives the retirement of Justices Brennan and Marshall, we do not think it can properly be applied in this context. The racial preference policies at issue in *Metro Broadcasting* had been specifically approved, indeed mandated, by Congress, in their exact form: though the FCC had developed them on its own, Congress had thereafter specifically directed the FCC to maintain them. *See* 497 U.S. at 560, 563. We do not think a race-based redistricting plan enacted by a state can be said to carry the same imprimatur of congressional approval, even when it is done with the purpose of complying with the Voting Rights Act or the Justice Department's interpretation thereof. The Voting Rights Act itself does not command a state to adopt a particular redistricting plan; instead, it simply forbids it to adopt plans that have the purpose or effect of diluting the voting strength of certain protected minority groups. Nor does the Justice Department have statutory authority to order a state to adopt a particular redistricting plan. Of course, the Justice Department may, and frequently does, tell a state, in the course of the § 5 preclearance process, that it believes its redistricting plan must contain a certain number of majority-minority districts in order to comply with the Act . But such a statement cannot fairly be considered a mandate from *Congress* to enact a plan with that number of majority-minority districts, since Congress has specifically given the state the right to challenge the Justice Department's interpretation of the Act in the United States District Court

employment, and government contracting, the specific type of discrimination that race-based redistricting is designed to redress -- denial of fair and effective representation -- threatens the very legitimacy of our nation's political system. Third, unlike most other types of affirmative action, race-based redistricting is a remedy whose benefits inure, in large part, to individuals who have themselves been victims of the discriminatory practices that it is designed to dismantle. *See* Grofman, Would Vince Lombardi Have Been Right If He Said: "When It Comes to Redistricting, Race Isn't Everything, It's the *Only* Thing?", 14 Cardozo L.Rev. 1237, 1246 & n. 40 (1993). Finally, as noted in our standing discussion, unlike the use of racial preferences in making admissions to medical school, deciding which employees to lay off, and awarding government contracts, the drawing of district lines so as to give effect to minority voting strength does not necessarily disadvantage members of other racial groups. So long as all citizens may vote, all individual votes receive the same weight, and no racial group's voting strength is unduly diluted by the resulting districting scheme, there is no unequal treatment *as between* affected groups. *See Shaw*, ___ U.S. at ___, 113 S.Ct at 2846 (Souter, J., dissenting); *Bakke*, 438 U.S. at 305 (Powell, J.) (noting that deliberate creation of majority-minority districts in order to give effect to existing minority voting strength "improve[s] the previously disadvantaged group's ability to participate without excluding individuals belonging to any other group from enjoyment of the relevant opportunity -- meaningful participation in the electoral process"). As discussed more fully below, these differences give rise to several specific difficulties in transposing developed strict scrutiny principles to the context of remedial redistricting.

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for the District of Columbia. For these reasons, we believe that the *Metro Broadcasting* principle cannot be used to justify application of something less than strict scrutiny here.

This is not to say, however, that the fact that this particular race-based redistricting plan was enacted in response to a § 5 objection from the Justice Department has no relevance in the Equal Protection analysis. To the contrary, we think it has considerable relevance, in deciding whether the state has a compelling interest in creating majority-minority districts. *See infra* at 64-69.

1. Burden of Proof

The parties disagree at the outset about the allocation of the burden of proof at the strict scrutiny stage of the Equal Protection analysis. Although plaintiffs and their supporting intervenors concede that they have the burden of proving the Plan is a "racial gerrymander" subject to strict scrutiny, they argue that if they succeed in doing this, the burden then shifts to the state to prove that the Plan's use of race is narrowly tailored to further a compelling governmental interest. According to them, this is how the three-judge court in *Hays I* viewed the state's burden of justification at the strict scrutiny stage of a racial gerrymandering case like this one. The state and its allies, by contrast, maintain that the state's burden is merely to identify a compelling justification for its use of race, and that plaintiffs retain the ultimate burden of persuading the court that its proferred justification is not compelling or that the Plan is not narrowly tailored to further it.

We think the state has the better of this argument. The Supreme Court repeatedly has emphasized that when members of a racial minority bring an Equal Protection challenge to a state law or policy, they bear the ultimate burden of persuasion throughout the proceeding. *See, e.g., Batson* v. *Kentucky*, 476 U.S. 79, 93-94 & n.18 (1986). The rule is no different for Equal Protection challenges to state laws or policies brought by members of the majority race. *Cf. Croson*, 488 U.S. at 494 (plurality) ("the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color"). In such a reverse-discrimination case, as in any other Equal Protection case, "[t]he ultimate burden remains with the [plaintiff] to demonstrate the unconstitutionality of [the] affirmative-action program." *Wygant*, 476 U.S. at 277-78 (plurality); *id.* at 292 (O'Connor, J., concurring in part and concurring in the judgment) ("in 'reverse discrimination' suits, as in any other suit, it is the plaintiffs who must bear the burden of demonstrating that their rights have been violated"). Proof that the challenged law or policy is race-based gives rise to a presumption that it is unconstitutional and shifts to the state the burden of "demonstrating" that its use of race was justified by a compelling governmental interest. *Croson*, 488 U.S. at 505 (majority). But the

burden thus shifted is one of production only, not persuasion; plaintiffs still "bear the ultimate burden of persuading the court that the [state's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the [remedial action] instituted on the basis of this evidence was not sufficiently 'narrowly tailored,'" and they can "establish a violation of their constitutional rights," and thus prevail on their Equal Protection claim, "[o]nly by meeting this burden." *Wygant*, 476 U.S. at 293 (O'Connor, J., concurring).

Nothing in *Shaw* purports to alter these well-settled principles of Equal Protection jurisprudence. Nor do we read the passage in *Hays I* upon which plaintiffs and their supporting intervenors rely as holding that the state bears the burden of persuasion with respect to either prong of the strict scrutiny inquiry. While the *Hays I* court did remark that there was a rough "parallelism" between "the State's burden here of establishing the affirmative justification of a compelling state interest" and a "criminal defendant's burden -- *at common law* -- of establishing an affirmative defense," 839 F. Supp. at 1206 (emphasis in original), it was very careful to point out that it was *not* using this analogy to make any point about the location of the burden of persuasion with respect to the presence or absence of such justification. *Id.* at 1206 n. 59. We therefore conclude that in a *Shaw*-like challenge to a race-based redistricting plan, as in any other sort of Equal Protection case, the state's burden at the strict scrutiny stage is producing evidence that the plans use of race is narrowly tailored to further a compelling state interest, and that plaintiffs retain the ultimate burden of persuading the court either that the proferred justification is not compelling or that the Plan is not narrowly tailored to further it. *See Wygant*, 476 U.S. at 292-93 (O'Connor, J., concurring).

2. Compelling State Interest

We next consider the circumstances in which a state might have a "compelling interest" in engaging in race-based redistricting to give effect to minority voting strength. At the outset, we note that, contrary to plaintiffs' suggestion, the critical question at this stage of the analysis is not whether the state had a compelling

interest in enacting the *particular* race-based redistricting plan under challenge, with all of its twists and turns, but whether it had a compelling interest in enacting *any* race-based redistricting plan. Whether the particular plan under challenge takes race into account to a greater degree than necessary to further a compelling state interest is a question for the "narrowly tailored" prong of the strict scrutiny analysis, which examines the "fit" between the compelling state interest and the precise means chosen by the state to accomplish it. *See Wygant*, 476 U.S. at 280 & n. 6 (opinion of Powell, J.); *Fullilove*, 448 U.S. at 507 (Powell, J., concurring). We therefore focus our attention here on the types of state interests that might be considered sufficiently "compelling" to justify race-based redistricting. The state and its allies have suggested two: compliance with the Voting Rights Act and eradicating the effects of past and present racial discrimination in North Carolina's political processes. We take these in turn.

a. Compliance with the Voting Rights Act

We agree that a state may have a "compelling" interest in engaging in race-based redistricting in order to comply with the substantive requirements of the Voting Rights Act. The Supreme Court has long recognized that a state's interest in eradicating the effects of its own past or present racial discrimination is sufficiently "compelling" to support its undertaking of race-based remedial action. *See Shaw*, ___ U.S. at ___, 113 S.Ct. at 2831; *Croson*, 488 U.S. at 491-93, 509-10 (plurality); *id.* at 518 (Kennedy, J., concurring in part and concurring in the judgment); *Wygant*, 476 U.S. at 280-82 (plurality); *id.* at 286 (O'Connor, J., concurring); *Bakke*, 438 U.S. at 307 (opinion of Powell, J.). The Court also has recognized that this interest extends to remedying past or present violations of federal *statutes* that are designed to eradicate such discrimination in particular aspects of life. *See Croson*, 488 U.S. at 500 (majority) ("constitutional or statutory violation[s]"); *Wygant*, 476 U.S. at 274-75 (plurality) (Title VII); *id.* at 289 (O'Connor, J., concurring) ("violation[s] of federal statutory or constitutional requirements"); *Bakke*, 438 U.S. at 307-09 (opinion of Powell, J.) ("constitutional or statutory violations"). Finally, the Court has made clear that a state need not await a judicial finding that it is guilty of past or present discrimination before embarking on a

voluntary program of remedial action designed to eradicate that discrimination, so long as it has a "strong basis in evidence" for concluding that such remedial action is "necessary." *Croson*, 488 U.S. at 500 (majority); *Wygant*, 476 U.S. at 277 (plurality); *id.* at 286 (O'Connor, J., concurring) ("a firm basis for believing that remedial action is required").[23] Indeed, the political branches of state government have an affirmative constitutional *duty* to take voluntary remedial action in the face of such evidence. *See Wygant*, 476 U.S. at 277 (plurality); *id.* at 291 (O'Connor, J., concurring); *Croson*, 488 U.S. at 519 (Kennedy, J., concurring).

Under these principles, we think it clear that a state has a "compelling" interest in engaging in race-based redistricting to give effect to minority voting strength whenever it has a "strong basis in evidence" for concluding that such action is "necessary" to prevent its electoral districting scheme from violating the Voting Rights Act. If a state's interest in remedying a violation of the anti-discrimination provisions of Title VII is sufficiently "compelling" to support its undertaking of race-based affirmative action, *see Wygant*, 476 U.S. at 274-75 (plurality); *id.* at 289-93 (O'Connor, J., concurring), its interest in remedying a violation of the anti-discrimination provisions of the Voting Rights Act is even more compelling, for Title VII is based only on the commerce power, whereas the Voting Rights Act is a direct exercise of Congress' broad constitutional power to enforce the provisions of the Fourteenth and Fifteenth Amendments. Indeed, the Supreme Court has recognized consistently that the Voting Rights Act is the single most important piece of federal anti-discrimination legislation ever passed by Congress -- enacted, and then twice extended, with the avowed purpose of putting a stop to nearly a century of "'unremitting and ingenious defiance' of the commands of the

[23] At one point, Justice Powell suggested that a state has a compelling interest in taking race-based remedial action only in the face of "judicial, legislative, or administrative *findings* of constitutional or statutory violations." *Bakke*, 438 U.S. at 307 (opinion of Powell, J.) (emphasis added). But he later revised this view, concluding that it was sufficient that the state have a "strong basis in evidence for [the] conclusion that remedial action [is] necessary." *Wygant*, 476 U.S. at 277 (plurality). A majority of the Court adopted this "strong basis in evidence" test in *Croson*. *See* 488 U.S. at 500 (O'Connor, J., joined in relevant part by Rehnquist, C.J., and White, Stevens, and Kennedy, JJ.).

Fifteenth Amendment" by the states and "'banish[ing] the blight of racial discrimination in voting' once and for all." *McCain* v. *Lybrand*, 465 U.S. 236, 244 (1984) (*quoting South Carolina* v. *Katzenbach*, 383 U.S. 301, 308-09 (1966)).

Nothing in *Shaw* suggests that a state's interest in complying with the Voting Rights Act is not sufficiently "compelling" to justify its engaging in race-based redistricting. Indeed, the *Shaw* majority specifically confirms that the states "have a very strong interest in complying with [the Voting Rights Act]," at least to the extent it is "constitutionally valid as interpreted and as applied." ___ U.S. at ___, 113 S.Ct. at 2830. We do not believe any of the provisions of the Voting Rights Act to be constitutionally infirm, at least when they are applied in accordance with the Supreme Court's established interpretation of them. The Court has specifically upheld the § 5 preclearance requirement as a legitimate exercise of Congress' power to enforce the Fifteenth Amendment, *South Carolina* v. *Katzenbach*, 383 U.S. 301, 334-35 (1966); *see City of Rome* v. *United States*, 446 U.S. 156, 180-82 (1980) (finding 1975 extension of § 5 constitutional on same ground), and it has rejected a claim that the "effect" prong of § 5 exceeds Congress' power under the Fifteenth Amendment because it reaches conduct which may not itself have violated the Fifteenth Amendment. *Id.* at 185-87. The constitutionality of the "purpose" prongs of § 5 and § 2 cannot be doubted, since they merely reiterate the substantive standards imposed upon the states by the Fourteenth and Fifteenth Amendments themselves. *See Chisom* v. *Roemer*, ___ U.S. , ___, 111 S.Ct. 2354, 2362 (1991). And we think it clear that the "results" prong of amended § 2, as interpreted in *Thornburg* v. *Gingles*, is constitutional under the test set forth in *South Carolina* v. *Katzenbach* and *City of Rome*. *See* 446 U.S. at 177 ("under section 2 of the Fifteenth Amendment, Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are 'appropriate,' as that term is defined in *McCulloch* v. *Maryland* and *Ex parte Virginia*"); *see also Croson*, 488 U.S. at 490 (opinion of O'Connor, J., joined by Rehnquist, C.J., and White, J) ("Congress ... has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment," which "may at times also include the power to define situations which *Congress*

determines threaten principles of equality and to adopt prophylactic rules to deal with those situations") (emphasis in original).[24] We therefore hold that a state necessarily has a "compelling" interest in engaging in race-based redistricting to whenever it has a firm basis for concluding that such action is necessary to bring its electoral districting scheme into compliance with the Voting Rights Act. *Accord Hays I*, 839 F. Supp. at 1217 (Walter, J., concurring).

As in other affirmative action contexts, a state need not await a judicial finding that its existing districting scheme (or a proposed revision thereof) actually violates the Voting Rights Act before it enacts a race-based redistricting plan designed to give effect to minority voting strength, so long as it has a "strong basis in evidence" for concluding that such action is "necessary" to avoid a violation of the Act. *See Croson*, 488 U.S. at 500 (majority); *Wygant*, 476 U.S. at 277 (plurality); *id.* at 286 (O'Connor, J., concurring). Nor must the state legislature make an explicit finding that the state's existing districting plan (or a proposed revision thereof) violates the Act before it draws one that deliberately gives greater effect to minority voting strength. *See id.* at 277-78 (plurality); *id.* at 289-90 (O'Connor, J., concurring). Such a specific contemporaneous finding of discrimination is of course useful to a court, because it provides "a means by which it can be made absolutely certain that the governmental actor truly is attempting to remedy its own unlawful conduct when it adopts an affirmative action plan, rather than attempting to alleviate the

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[24] We recognize that the constitutionality of amended § 2 technically remains an open one, notwithstanding the magnitude of all that has been done under the authority of *Gingles*. *See Chisom* v. *Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting) (writing separately solely to reserve this issue); *DeGrandy*, ___ U.S. at ___, 62 U.S.L.W. at 4764 (Kennedy, J., concurring in part and concurring in the judgment) (again reserving this point); *see also Shaw*, ___ U.S. at ___, 113 S.Ct. at 2831 (reserving question that "if § 2 did require adoption of North Carolina's revised plan, § 2 is to that extent unconstitutional). But we believe that once legislation of such magnitude and consequential importance has been fully analyzed, interpreted, and applied by the Supreme Court, as amended § 2 has been in *Gingles*, *Voinovich* v. *Quilter*, ___ U.S. ___, 113 S.Ct. 1149 (1993), *Growe* v. *Edmison*, ___ U.S. ___, 113 S.Ct. 1075 (1993), and *DeGrandy*, its constitutionality must be assumed by lower federal courts (and all other branches of state and federal government), even though the Court has never expressly confirmed it.

wrongs suffered through general societal discrimination." *Id.* at 289. But it is not essential; all that is required is evidence that the legislature "act[ed] on the basis of information which g[ave] [it] a sufficient basis for concluding that [such] remedial action [was] necessary." *Id.* at 291.[25] As Justice O'Connor has explained, a rule that a state actor must make an explicit finding that it is guilty of illegal discrimination before it can take voluntary steps to remedy that discrimination "would severely undermine [the state's] incentive to meet voluntarily [its] civil rights obligations," which would "clearly be at odds with [the] Court's and Congress' consistent emphasis on the value of ... voluntary compliance" with the federal discrimination laws. *Id.* at 290 (internal citations omitted).

A state has a "strong basis in evidence" for concluding that it must engage in race-based redistricting in order to comply with the Voting Rights Act when it has information sufficient to support a *prima facie* showing that its failure to do so would violate the Act. *See Croson*, 488 U.S. at 500 (majority) (evidence "approaching a prima facie case of a constitutional or statutory violation"); *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring) ("demonstrable evidence . . . . sufficient to support a prima facie Title VII . . . claim by [the] minority"); *see also Johnson* v. *Transportation Agency*, 480 U.S. 616, 650-52 (1987) (O'Connor, J., concurring in the judgment) (evidence sufficient for a "Title VII prima facie case" by the relevant minority).[26] There are at least two situations in which this

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[25] Though *Croson* requires a state or local governmental actor to "identify" specific instances of past or present discrimination "with some specificity" before undertaking race-based remedial action, 488 U.S. at 504 (majority), it does not alter the *Wygant* rule that the governmental actor is not required to make a formal finding of such discrimination on the record before doing so. *See id.* at 500 (majority) (sufficient if state actor has "a strong basis in evidence for its conclusion that remedial action was necessary'") (quoting *Wygant*, 476 U.S. at 277 (plurality)). Instead, *Croson* holds only that the governmental actor must be able to demonstrate that it was attempting to remedy specific instances of past or present discrimination within its own jurisdiction, as opposed to general "societal discrimination." *See id.* at 504-05 (majority).

[26] This does not mean, of course, that a state attempting to defend a race-based redistricting plan designed to comply with the Voting Rights Act must prove that its existing plan (or a proposed revision thereof) actually violates the Act in order to meet its burden of justification at the strict scrutiny stage; nor does it mean that the court must make such a finding in order to uphold the plan under

might be the case, both of which are suggested by the state and its allies here.

The first is when the state has before it information sufficient to support a *prima facie* § 2 challenge to the existing districting plan by members of the relevant minority group. To make out a *prima facie* § 2 challenge to a single-member districting scheme, members of a protected racial minority must show three things: (i) that their population is "sufficiently large and geographically compact to constitute a majority" in more single-member districts than the number in which they have a majority under the challenged scheme; (ii) that they are "politically cohesive," and (iii) that "the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate" in districts that are not majority-minority. *See Growe* v. *Emison*, ___ U.S. ___, ___, 113 S.Ct. 1075, 1084 (1993) (internal quotations omitted); *Voinovich* v. *Quilter*, ___ U.S. ___, ___, 113 S.Ct. 1149, 1157 (1993).[27] When a state legislature has before it information

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strict scrutiny. *See Wygant*, 476 U.S. at 292 (O'Connor, J., concurring) (a reverse-discrimination challenge to a state's voluntary affirmative action plan "does not automatically impose upon the [state] the burden of convincing the court of its liability for prior unlawful discrimination; nor does it mean that the court must make an actual finding of prior discrimination based upon the [state's] proof before [its] affirmative action plan will be upheld"); *Johnson*, 480 U.S. at 652-53 (O'Connor, J., concurring in the judgment) (same). Such a rule would impose an unfair burden of omniscience upon the state, which is "trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent ... discrimination [in its electoral districting scheme] and liability to nonminorities if affirmative action *is* taken." *Wygant*, 476 U.S. at 291 (O'Connor, J., concurring). Instead, the court need only find that the state enacted the race-based redistricting plan based on information which gave it "a strong basis in evidence for ... conclu[ding] that [such] remedial action was necessary" to comply with the Voting Rights Act. *Id.* at 277 (plurality); *id.* at 292-93 (O'Connor, J., concurring).

[27] *DeGrandy* does not alter this settled understanding of the nature of a *prima facie* case under § 2. The Court there made explicit the notion, already implicit in its earlier § 2 cases, that while proof of the three *Gingles* conditions is *necessary* to establish a § 2 violation, it is not necessarily *sufficient*, "either in the sense that a court's examination of relevant circumstances [is] complete once the three factors [are] found to exist, or in the sense that the three in combination necessarily and in all circumstances demonstrate[ ] dilution." ___ U.S. at ___, 62 U.S.L.W. at 4759. Instead, proof that the three *Gingles* conditions exist with respect to a particular plan will support a finding that the plan violates § 2 only

sufficient to permit it to conclude that the relevant minority group could make out such a *prima facie* § 2 challenge to the existing plan, then it has a "strong basis in evidence" for concluding that it needs to engage in race-based redistricting to comply with § 2, and it has necessarily established a compelling interest in doing so.[28] *See Hays I*, 839 F. Supp. at 1217 (Walter, J., concurring); *see also Croson*, 488 U.S. at 500 (majority) (evidence "approaching a prima facie case of a constitutional or statutory violation"); *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring) (evidence "sufficient to support a prima facie Title VII ... claim by [the] minority"); *Johnson* v. *Transportation Agency*, 480 U.S. 616, 650-52 (1987) (O'Connor, J., concurring in the judgment) (evidence sufficient for a "Title VII prima facie case" by the relevant minority).[29]

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if the court further finds, after considering all other factors that "arguably bear[ ] on the issue of equal political opportunity," that the circumstances in totality show that the plan would deny minority voters an equal opportunity "to participate in the electoral process and to elect representatives of their choice." *Id.* at ___, 62 U.S.L.W. at 4759-60. The Court's holding that proof of the three *Gingles* conditions does not necessarily compel a finding of a § 2 violation, however, cannot fairly be read to alter the settled understanding that such proof is sufficient to make out a *prima facie* case under § 2. *Cf. St. Mary's Honor Center* v. *Hicks*, ___ U.S. ___, 113 S.Ct. 2742 (1993) (proof of *McDonnell Douglas* factors, though sufficient to make out a *prima facie* case of discrimination under Title VII, will not necessarily suffice to prove a Title VII violation, even if unrebutted).

[28] That is, unless the existing plan already creates majority-minority districts in substantial proportion to the minority's share of voting-age population. In such a case, a state will not have a "strong basis in evidence" for concluding that further race-based remedial action is necessary to bring its electoral scheme into compliance with § 2, unless it has some compelling evidence that the existing plan's lines, though appearing to confer political and electoral power upon the minority in rough proportion to its share of the relevant population, nonetheless deny the minority an equal opportunity to participate in the electoral process and to elect representatives of its choice. *Cf. DeGrandy*, __ U.S. at __, 62 U.S.L.W. at 4760-62 (in a § 2 challenge to a single-member districting plan, a showing that the plan "[creates] majority-minority districts in substantial proportion to the minority's share of voting-age population" should make a court reluctant to conclude that it denies minority voters equal opportunity to participate in the political process and to elect representatives of their choice, hence violates § 2).

[29] If the Justice Department has denied preclearance to an earlier plan on the ground that it was in "clear violation" of § 2, as its § 5 regulations permit it to do, *see* 28 C.F.R. § 51.55(b)(2), this fact, standing alone, would probably be sufficient to give the state a "substantial basis in evidence" for concluding that it

The second, which is a possibility only in jurisdictions subject to the preclearance requirements of § 5, is that a plan previously proposed by the state for the same round of redistricting has been denied preclearance on the ground that it fails to give sufficient effect to minority voting strength to satisfy § 5. Section 5 forbids a covered jurisdiction to put a redistricting plan into effect unless it proves, to the satisfaction of either the United States District Court for the District of Columbia or its surrogate, the United States Department of Justice, that the proposed plan had neither the "purpose ... [nor] the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c; *see Georgia* v. *United States*, 411 U.S. 526, 531-35 (1973); *McDaniel* v. *Sanchez*, 452 U.S. 130, 137 (1981). The Supreme Court has consistently held that the § 5 standard has two prongs, a "purpose" prong and an "effect" prong, and that a plan cannot be precleared unless it satisfies both of them. *McCain* v. *Lybrand*, 465 U.S. 236, 247 (1984); *City of Lockhart* v. *United States*, 460 U.S. 125, 130 & n. 4 (1983); *City of Port Arthur* v. *United States*, 459 U.S. 159, 168 (1982); *City of Rome* v. *United States*, 446 U.S. 156, 172 (1980); *Beer* v. *United States*, 425 U.S. 130, 136 n. 7, 141 (1976); *City of Richmond* v. *United States*, 422 U.S. 358, 372-73 (1975). As currently interpreted by the Supreme Court, the "effect" prong of § 5 is relatively toothless, being satisfied -- at least in the context of legislative reapportionment -- simply by proof that the proposed plan will not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141.[30] The "purpose" prong, by

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needed to engage in race-based redistricting in order to avoid a violation of § 2. *See Bakke*, 438 U.S. at 305 (opinion of Powell, J.) (§ 5 objection by Justice Department is properly viewed as "an administrative finding of discrimination," which is sufficient to give the state a compelling interest in taking race-based remedial action). But that issue is not presented in this case, since the Justice Department's denial of preclearance was not based on the ground that the proposed plan was in clear violation of § 2, but on the ground that the state had failed to meet its burden of demonstrating that the plan did not violate the "purpose" prong of § 5 itself. Accordingly, we need not address plaintiff-intervenors' argument that the Justice Department has exceeded its authority under § 5 by incorporating the § 2 "results" standard into the § 5 preclearance analysis.

[30] The Justice Department has argued elsewhere that Congress intended the 1982 amendments to § 2 to alter *Beer*'s interpretation of the "effect" prong of §

contrast, requires a showing that the proposed plan was not designed to dilute minority voting strength in the sense forbidden by the Constitution. *City of Port Arthur*, 459 U.S. at 168; *City of Richmond*, 422 U.S. at 372, 378-79.[31] The Supreme Court has previously upheld the denial of preclearance to redistricting plans which, though non-retrogressive, have not been shown to be free from such a racially discriminatory purpose. *See, e.g., Busbee* v. *Smith*, 549 F. Supp. 494, 516 (D.D.C. 1982) (three-judge court), *aff'd*, 459 U.S. 1166 (1983); *see also City of Richmond*, 422 U.S. at 372, 378-79.[32]

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5. The Supreme Court has specifically reserved this question, *City of Lockhart*, 460 U.S. at 133 n.9, and we do not reach it here.

[31] The "purpose" prong of § 5 thus essentially duplicates the constitutional vote dilution standard, except that it shifts the burden of proof with respect to the constitutionality of a proposed redistricting plan from affected minority groups to the covered jurisdiction. *See Beer*, 425 U.S. at 147-48 (Marshall, J., dissenting); Days, Section 5 and the Role of the Justice Department, in *Controversies in Minority Voting: The Voting Rights Act in Perspective* (ed. B. Grofman and C. Davidson, 1993), at 53.

[32] As did the three-judge court in *Hays I*, *see* 839 F. Supp. at 1207 (majority); *id.* at 1218 (Walter, J., concurring), plaintiffs and their supporting intervenors read *Beer* as holding that the § 5 standard is necessarily satisfied so long as the proposed plan is not "retrogressive." With all respect, this is simply incorrect. *Beer* held only that the "effect" prong of § 5 is satisfied by proof that a proposed plan does not have a retrogressive effect; it did not purport to define the meaning of the "purpose" prong. Indeed, the *Beer* Court specifically stated that even a nonretrogressive redistricting plan would fail to satisfy § 5 if it "so discriminates on the basis of race or color as to violate the Constitution." *Beer*, 425 U.S. at 141; *see also id.* at 142 n. 14. The discussion of § 5 in *Shaw*, ___ U.S. at ___, 113 S.Ct. at 2830-31, does not cast doubt on this settled understanding of the two-pronged nature of the § 5 standard. Though the Court indicates that a state would have a firm basis for concluding that § 5 required it to give greater effect to minority voting strength if it had evidence that its proposed plan would have a "retrogressive" effect on the position of minority voters, *id.* at ___, 113 S.Ct. at 2830, the Court does not say this is the *only* basis on which a state might properly conclude that further race-based remedial action was necessary to comply with § 5.

The interpretation of § 5 suggested by plaintiffs, which would allow jurisdictions whose existing districting schemes were already unconstitutionally diluting minority voting strength to obtain preclearance of plans that deliberately perpetuated that constitutional wrong, so long as they did not make it worse, would undermine the central purpose of § 5, which was to break the cycle of

When an earlier version of a state's redistricting plan is denied preclearance by the United States District Court for the District of Columbia on the ground that it fails to satisfy either the "purpose" or "effect" prong of the § 5 test, the state obviously has a "strong basis in evidence" for concluding that the Voting Rights Act requires it to engage in race-based redistricting in order to remedy that problem. *See Bakke*, 438 U.S. at 307 (opinion of Powell, J.) (judicial finding of statutory violation sufficient to give state a compelling interest in taking race-based remedial action). The same is normally true when preclearance is denied by the Justice Department, which Congress has authorized to serve as a surrogate for the District Court in reviewing § 5 submissions. *See id.* at 305 (opinion of Powell, J.) (§ 5 objection by Justice Department is properly viewed as "an administrative finding of discrimination," which is sufficient to give the state a compelling interest in taking race-based remedial action). Contrary to plaintiffs' suggestion, the Equal Protection Clause does not require a state to challenge a Justice Department denial of preclearance in the United States District Court for the District of Columbia, and lose, before it may safely conclude that it has a compelling interest in adopting a new plan to address the concerns upon which the Department's denial of preclearance was based. Such a rule would indicate disrespect for the judgment of the Attorney General, who has been authorized by Congress to serve as a surrogate for the District Court in reviewing § 5 submissions. It would also be inconsistent with the general federal policy of encouraging the states to comply voluntarily with their obligations under the federal civil rights laws. *See Wygant*, 476 U.S. at 29091 (O'Connor, J., concurring). Finally, it would encourage needless litigation, which would undermine the central purpose of the § 5 preclearance requirement: to prevent jurisdictions whose electoral systems have been infected with official racial discrimination in the recent past [33] from avoiding

"unremitting and ingenious defiance" of the constitutional guarantees of nondiscrimination in voting by covered states. *See Katzenbach*, 383 U.S. at 309.

[33] Coverage under § 5 is tantamount to a congressional finding that the jurisdiction in question has committed identified violations of the Fifteenth Amendment in the relatively recent past, *see McCain* v. *Lybrand*, 465 U.S. at 244-45; *Bakke*, 438 U.S. at 302 n. 41 (opinion of Powell, J.), which could conceivably be regarded as sufficient, in and of itself, to give that jurisdiction a "strong basis in evidence" for thinking that it must engage in race-based

their constitutional duty to remedy the effects of that discrimination by engaging in protracted litigation over the nature of that obligation. *See McCain*, 465 U.S. at 244-46; *see also South Carolina* v. *Katzenbach*, 383 U.S. at 335. Instead, we believe that a state has a "strong basis in evidence" for concluding that it must engage in race-based redistricting to comply with § 5 whenever the Justice Department has refused to preclear a plan it has proposed for the same round of redistricting on the ground that it fails to satisfy the § 5 standard, and the state reasonably concludes, after conducting its own independent reassessment of the rejected plan in light of the concerns identified by the Justice Department, that the Justice Department's conclusion is legally and factually supportable.[34]

redistricting to avoid a violation of the Voting Rights Act, leaving only the question whether the particular race-based plan it enacts is "narrowly tailored" to further that interest. *See id.* at 307 (legislative finding of identified past discrimination sufficient to trigger compelling interest in taking race-based remedial action). *Compare Croson*, 488 U.S. at 504 (majority) (general congressional finding that there had been past discrimination in the nation's construction industry as a whole was not sufficiently "specific" or "particularized" to give city a strong basis for believing that race-based remedial action was required to remedy the effects of that discrimination within its own jurisdiction). But we need not decide here whether § 5 coverage, standing alone, is sufficient to give a state a "strong basis in evidence" for concluding that it must engage in race-based redistricting to comply with the Voting Rights Act, for in this case, the state's conclusion that it had to engage in race-based redistricting to comply with § 5 was based not merely on the fact that it was subject to § 5, but on an explicit finding by the Justice Department that its proposed plan did not satisfy § 5.

[34] This is not to say, of course, that a state which has submitted a proposed redistricting plan to the Justice Department for administrative preclearance, and been denied it, may not challenge the Department's denial of preclearance in the United States District Court for the District of Columbia, if it believes it to be unfounded, before enacting a race-based alternative plan. It is only to say that a state may properly regard the Justice Department's denial of preclearance as an "administrative finding" that its proposed plan violates the anti-discrimination provisions of the Voting Rights Act, which is sufficient – unless clearly legally and factually unsupportable – to justify its adoption of a race-based alternative plan designed to remedy that violation. *See Bakke*, 438 U.S. at 305-07 (opinion of Powell, J.).

b. Eradicating Effects of Past or Present Discrimination In North Carolina's Political Processes

The state and its allies also argue that a state may have a "compelling" interest in engaging in race-based redistricting to eradicate the effects of past or present racial discrimination in its political processes, even when it has no basis for believing that the Voting Rights Act requires it to do so. We agree.

The Supreme Court has recognized repeatedly that a state has a compelling interest in taking race-based affirmative action where it has a firm basis for concluding that such action is necessary to eradicate the effects of past or present racial discrimination within its own jurisdiction, even when it has no federal statutory mandate to do so. *See, e.g., Croson*, 488 U.S. at 491-93 (opinion of O'Connor, J., joined by Rehnquist, C.J., and White, J.); *id.* at 509 (plurality); *id.* at 518 (Kennedy, J., concurring); *Wygant*, 476 U.S. at 280-82 (plurality); *id.* at 286 (O'Connor, J., concurring). Of course, generalized evidence that past "societal discrimination" has continuing effects within the state is not sufficient to trigger this compelling interest. *See Croson*, 488 U.S. at 504-06 (majority); *Wygant*, 476 U.S. at 276 (plurality) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy"); *Bakke*, 438 U.S. at 308-09 (Powell, J., concurring). Instead, the state must demonstrate that it had a "strong basis in evidence" for believing that race-based remedial action was "necessary" to remedy specific instances of racial discrimination, either public or private, within its own jurisdiction. *Croson*, 488 U.S. at 500-06 (majority); *see id.* at 518 (Kennedy, J., concurring). While the state must "identify that discrimination, public or private, with some particularity" before it may take race-based remedial action, *id.* at 504, it need not make an explicit finding of discrimination on the record, so long as it can demonstrate that it acted on the basis of evidence that would have permitted it to do so. *See Wygant*, 476 U.S. at 289-91 (O'Connor, J., concurring).

Under these principles, we think it clear that a state may have a compelling interest in engaging in race-based redistricting to give effect to minority voting strength, even when it has no reason to

believe that the Voting Rights Act requires it to do so, where it has a substantial basis in evidence for concluding that such action is necessary to eradicate the effects of identified past or present racial discrimination in its own political processes.[35] *Accord Hays I*, 839 F.Supp. at 1215 (Walter, J., concurring). As a practical matter, a state defending a race-based redistricting plan against a *Shaw*-like challenge will seldom need to rely very heavily on this particular justification, for the evidence required to establish the existence of this compelling interest will normally be sufficient to demonstrate that the State had a firm basis for believing that race-based redistricting was required to avoid a potential § 2 violation, and thus that it had a compelling interest in taking such action to comply with the Voting Rights Act. But there may be cases in which a state will have a compelling interest in engaging in race-based redistricting to remedy identified instances of discrimination in its own political processes, even when it has no firm basis for concluding that § 2 requires it to do so: for example, when it has a history of official racial discrimination in its electoral system, which has resulted in the virtual exclusion of members of a particular racial minority from participation in its political processes, but it knows that the creation of majority-minority districts is not required by the "effects" prong of § 5, because it has never had such districts before, and that the relevant minority group cannot show that § 2

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[35] The *Shaw* majority recognized the possibility that a State might have a compelling interest in engaging in race-based redistricting to eradicate the effects of past discrimination in its electoral processes that was "entirely distinct from the Voting Rights Act." ___ U.S. at ___, 113 S.Ct. at 2931-32. It is true that the Court remarked that "only three Justices in *UJO* were prepared to say that States have a significant interest in minimizing the consequences of racial bloc voting apart from the requirements of the Voting Rights Act," and that those three Justices "specifically concluded" that race-based redistricting could be justified on this ground "only when the State 'employ[s] sound districting principles.'" *Id.* at ___, 113 S.Ct. at 2832 (citing *UJO*, 430 U.S. at 167-68 (White, J., joined by Stevens and Rehnquist, JJ.)). But we do not read this statement as implying that a state cannot have a compelling interest in engaging in race-based redistricting to remedy the effects of identified instances of past or prevent discrimination in its own political processes unless it has reason to believe that the Voting Rights Act requires it to do so. Instead, we think the Court meant only that a race-based redistricting plan adopted to further this interest, like any other type of redistricting plan, must be based on *rational* districting principles that ensure that all citizens covered by it receive fair and effective representation. *See infra* at 87-88 & n.44.

requires the creation of any majority-minority districts, because it is too widely dispersed to constitute a majority in a single-member district that is "geographically compact" under *Gingles*. For that reason, we think it important to recognize this as an independent compelling interest that may justify race-based redistricting.

3. Narrowly Tailored

We turn, finally, to the question of how to determine whether a particular race-based redistricting plan, if supported by a compelling state interest, is "narrowly tailored" to the achievement of that interest. *Shaw* itself has very little to say about this aspect of the strict scrutiny analysis, except to indicate that a plan which deliberately creates majority-minority districts in order to comply with the Voting Rights Act would not be "narrowly tailored" to that goal if it "went beyond what was reasonably necessary to avoid" a violation of the Act. ___ U.S. at ___, 113 S.Ct. at 2831. We therefore seek guidance in the Court's decisions applying the "narrowly tailored" standard to other types of race-based remedial measures.

In other contexts, the Supreme Court has looked to five basic factors to decide whether a race-based affirmative action program is "narrowly tailored" to further a compelling state interest in remedying identified discrimination: (i) the efficacy of alternative remedies; (ii) whether the program imposes a rigid racial "quota" or just a flexible racial "goal"; (iii) the planned duration of the program; (iv) the relationship between the program's goal for minority representation in the pool of individuals ultimately selected to receive the benefit in question and the percentage of minorities in the relevant pool of eligible candidates; and (v) the impact of the program on the rights of innocent third parties. *See United States* v. *Paradise*, 480 U.S. 149, 171-85 (1987) (plurality); *id.* at 186-89 (Powell, J., concurring); *Sheet Metal Workers* v. *EEOC*, 478 U.S. 421, 485-89 (1986) (Powell, J., concurring in part and concurring in the judgment); *see also Croson*, 488 U.S. at 507-08 (majority); *Wygant*, 476 U.S. at 279-84 (plurality); *Fullilove* v. *Klutznick*, 448 U.S. 448, 510-15 (1980) (opinion of Powell, J.) (applying same strict scrutiny analysis to affirmative action plan adopted by

Congress).[36] Though these factors were developed in the context of affirmative action programs in public employment and government contracting, we think they can be transposed fairly easily to the context of race-based redistricting. *See Hays I*, 839 F. Supp. at 1206-09 (majority) (looking to same five factors in deciding whether a race-based redistricting plan is "narrowly tailored" under *Shaw*); *id.* at 1215 (Walter, J., concurring) (same).

The first factor requires the court to decide whether the state could have accomplished its compelling purpose just as well by some alternative means that was either completely race-neutral or made less extensive use of racial classifications. *See Wygant* 476 U.S. at 280 n. 6 (plurality) ("'whether a nonracial approach or a more narrowly-tailored racial classification could promote the [compelling] interest about as well and at tolerable administrative expense'"); *Croson*, 488 U.S. at 507 (majority); *see also Sheet Metal Workers*, 478 U.S. at 486-87 (Powell, J., concurring); *Paradise*, 480 U.S. at 171-77 (plurality); *id.* at 188 (Powell, J., concurring); *id.* at 199-201 (O'Connor, J., dissenting). A state that has a compelling interest in engaging in race-based redistricting to comply with the Voting Rights Act obviously has no *completely*

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[36] Applying these factors, the Court has held that three race-based affirmative action programs were sufficiently "narrowly tailored" to pass constitutional muster, *see Paradise*, 480 U.S. at 171-86 (plurality); *id.* at 187-89 (Powell, J., concurring); *Sheet Metal Workers*, 478 U.S. at 479-81 (plurality); *id.* at 485-89 (Powell, J., concurring); *Fullilove*, 448 U.S. at 480-92 (opinion of Burger, J.); *id.* at 510-15 (Powell, J., concurring); and that two others were not, one because it imposed a rigid racial quota and was adopted without consideration of race-neutral alternatives, *see Croson*, 488 U.S. at 507-08 (majority), and the other because it unduly burdened third-party interests, *see Wygant*, 476 U.S. at 279-84 (plurality); *id.* at 293-94 (O'Connor, J., concurring).

Paradise and *Sheet Metal Workers* involved Equal protection challenges to affirmative actions plans that were judicially-imposed; *Wygant* and *Fullilove* challenges to ones that were voluntarily-adopted. But the distinction is of no consequence at this stage of the analysis, for the Court has applied the same "narrowly tailored" analysis -- derived essentially from Justice Powell's plurality opinion in *Wygant* and his earlier concurrence in *Fullilove* -- to both types of plans. *Compare Paradise*, 480 U.S. at 171-85 (plurality); *id.* at 186-89 (Powell, J., concurring); and *Sheet Metal Workers*, 478 U.S. at 479-81 (plurality); *id.* at 485-89 (Powell, J., concurring) with *Wygant*, 476 U.S. at 279-84 (plurality); and *Fullilove*, 448 U.S. at 510-15 (Powell, J., concurring).

race-neutral alternative means of accomplishing that end.[37] *Compare Croson*, 488 U.S. at 510 (plurality). In such a case, the primary inquiry with respect to this factor will therefore be whether the state could have complied with the Act by enacting a redistricting plan which, though race-based, made *less extensive* use of racial classifications than the one it chose.[38] Because the "racial classification" at issue here is the use of race to assign voters to districts, we agree with the three-judge court in *Hays I* that inquiry here is properly confined to two questions: whether the plan creates more majority-minority districts than is reasonably necessary to comply with the Act, and whether the majority-minority districts it creates contain substantially larger concentrations of minority voters than is reasonably necessary to give minority voters a realistic opportunity to elect representatives of their choice in those districts. *See Hays I*, 839 F. Supp. at 1206-08 (majority); *id.* at 1218 (Walter, J., concurring).[39]

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[37] This does not mean that any race-based redistricting plan adopted to comply with the Voting Rights Act necessarily fails constitutional scrutiny for want of proper consideration of race-neutral alternative means of remedying the discrimination in question. *See Croson*, 488 U.S. at 507 (majority). Congress itself carefully considered and rejected race-neutral alternatives for remedying discrimination in the states' electoral processes when it enacted, and then twice extended, the provisions of the Voting Rights Act that require the states to consider race in redistricting. *See UJO*, 430 U.S. at 175-76 (Brennan, J., concurring in part) ("[T]he history of the Voting Rights Act provides reassurance that ... the congressional decision to authorize the use of race-oriented remedies in this context was the product of substantial and careful deliberations ... [and] represents an unequivocal and well-defined congressional consensus on the national need for 'sterner and more elaborate measures' to secure the promise of the Fourteenth and Fifteenth Amendments with respect to the exercise of the franchise"); *see also McCain* v. *Lybrand*, 465 U.S. 236, 243-48 (1984); *City of Rome* v. *United States*, 446 U.S. 156, 172-78, 180-83 (1980); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308-09 (1966).

[38] The same cannot necessarily be said for a state that engages in race-based redistricting not to further a compelling interest in complying with the Voting Rights Act, but to further an independent interest in eradicating the effects of past or present racial discrimination in its political processes. *See supra* at 69-72.

[39] The race-based redistricting plan at issue in *Hays I* was found to be not "narrowly tailored" to the state's asserted interest in complying with the Voting Rights Act chiefly because it "packed" minority voters into majority-minority districts in percentages "well in excess" of those reasonably necessary to give

The second factor requires a court to determine whether the challenged plan imposes a "strict racial quota" designed "to achieve and maintain racial balance," or simply a "flexible goal" to be used as a "benchmark" for gauging the success of the state's efforts to eliminate the particular discrimination in question. *Sheet Metal Workers*, 478 U.S. at 477-78 (plurality); *see id.* at 487-88 & n. 4 (Powell, J., concurring). As Justice O'Connor has explained repeatedly, a rigid racial quota is constitutionally impermissible, even to further a compelling interest in remedying identified discrimination, because it rests upon the "'completely unrealistic' assumption" that members of various racial groups would be represented in particular positions "in lockstep proportion to their proportion in the [general] population," were it not for unlawful discrimination. *Croson*, 488 U.S. at 507 (majority); *see Paradise*, 480 U.S. at 197 (O'Connor, J., dissenting). But race-based redistricting plans will seldom be invalid on this ground, for they do not impose the sort of "rigid racial quota" that the Court has previously found constitutionally infirm. Unlike the racial set-aside provisions invalidated in *Bakke* and *Croson*, a redistricting plan which creates a certain number of electoral districts in which members of a racial minority constitute a majority of the voting age population (or even of registered voters) does not guarantee members of that race a fixed percentage of the benefit ultimately at stake (here, membership in the relevant legislative body), for it does not prevent nonminority candidates for running for office in such districts, nor does it guarantee that they will not be elected from them.[40] *See DeGrandy*, ___ U.S. at ___, 62 U.S.L.W. at 4764 (Kennedy, J., concurring in part and concurring in the judgment) ("The assumption that majority-minority districts elect only minority representatives ... is false as an empirical matter"). While such a plan guarantees the minority a fair *opportunity* to elect a certain number of representatives of their choice, that number cannot fairly be termed a "quota," since there is no guarantee that it will be achieved; instead, can only be viewed as a flexible "goal" for

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them a fair opportunity to elect candidates of their choice in those districts. *See* 839 F. Supp. at 1207-08 (majority); *id.* at 1218 (Walter, J., concurring).

[40] The North Carolina General Assembly, for example, has three white members elected from majority-minority districts created by the *Gingles* redistricting. *See infra* at 145.

minority representation in the relevant legislative body. *See Sheet Metal Workers*, 478 U.S. at 487-88 & n. 4 (Powell, J., concurring). *Compare Ravitch* v. *City of New York*, 1992 WL 196735 (S.D.N.Y. Aug. 3, 1992), at * 7 (provision in city charter requiring racial minorities to be represented on appointed city commission in direct proportion to their percentage in the city's population as a whole was not "narrowly tailored" to city's compelling interest in remedying past discrimination, because it imposed a "rigid" racial quota).

The third factor asks whether the challenged affirmative action plan is a temporary measure with some built-in mechanism to prevent it from lasting longer than is reasonably necessary to eliminate the effects of the particular discrimination it is designed to redress. *See Fullilove*, 448 U.S. at 513 (Powell, J., concurring) (a "temporary" measure that "will not last longer than the discriminatory effects it is designed to eliminate"); *Sheet Metal Workers*, 478 U.S. at 479 (plurality) (a "temporary tool for remedying [identified] discrimination" that "will end as soon as ... it is no longer needed to remedy [that] discrimination"); *id.* at 487 (Powell, J., concurring) ("of limited duration"); *Paradise*, 480 U.S. at 178 ("temporary in application," with a term "contingent upon the [state's] own conduct"); *see also Croson*, 488 U.S. at 498 (plurality) (not "timeless in its ability to affect the future"). A race-based redistricting plan governing elections to the United States Congress or a state legislature will almost always satisfy this requirement: such plans are inherently temporary in nature, because the states are, as a practical matter, required to redraw them after each decennial census, in order to even out irregularities in district population caused by intervening demographic changes. *See Karcher* v. *Daggett*, 462 U.S. 725, 731 (1983) (congressional districting); *Mahan* v. *Howell*, 410 U.S. 315 (1973) (districting for state legislature). When the state legislature undertakes this redistricting process after each census, it will of course be forced, by considerations of suits like this one, to re-evaluate the continued need for race-based redistricting in light of the electoral experiences under the prior plan. Compare *Ravitch*, supra, at * 7 (provision in city charter that required appointments to city commission to be made on basis of race was not "narrowly tailored" to its compelling purpose in remedying past discrimination, because it "made no

provision whatsoever for its termination" but was of "indefinite" duration).[41]

The fourth factor asks whether there is a reasonable relationship between the challenged plan's goal for minority representation in the pool of individuals ultimately selected to receive the benefit in question (be it a government contract, a place in a medical school class, or a job) and the percentage of minorities in the relevant pool of eligible candidates. *See Paradise*, 480 U.S. at 187 (Powell, J., concurring) (such a goal must be directly related to "the percentage of minority group members in the relevant population or work force"); *id.* at 198-99 (O'Connor, J., dissenting) ("of vital importance" that such a goal "not substantially exceed the percentage of [eligible] minority group members in the relevant population or work force"). In the redistricting context, we think this factor is satisfied so long as the percentage of majority-minority districts created by the plan -- which, as indicated earlier, is best seen as a flexible goal for minority representation in the pool of individuals selected to receive the ultimate benefit of membership in the relevant legislative body -- does not substantially exceed the

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[41] Section 5 of the Voting Rights Act, which serves as the impetus for most race-based redistricting, is itself a temporary remedy, both generally and in its application to particular jurisdictions. The Voting Rights Act provides that § 5 will expire of its own accord in 2007, 42 U.S.C. § 1973b(a)(7) (Supp. 1994), and specifically requires Congress to reconsider it in 1997, *id.* § 1973b(a)(8). And the Act's "bailout" provisions ensure that no jurisdiction will labor under § 5's mandate for any longer than reasonably necessary to eliminate the effects of the particular discrimination which it is designed to eradicate. *See id.* § 1973b(a)(1) (authorizing any jurisdiction subject to § 5 coverage to escape from that coverage by persuading the District Court for the District of Columbia that it has been free from the sort of discrimination that triggered its § 5 coverage for a certain number of years).

Though amended § 2 has no expiration date, it too has a built-in mechanism which ensures that its race-based remedies will not be available any longer than is reasonably necessary to eliminate the effects of the particular discrimination which they are designed to redress. That mechanism is § 2's substantive requirement that the relevant minority prove the continued existence of racial bloc voting in order to obtain race-based relief under it. In application, this requirement means that § 2 can be used to compel race-based remedial redistricting only so long as its elections continue to be characterized by significant racial bloc voting -- the most lasting effect of the official discrimination which § 2 is designed to remedy.

percentage of minority voters in the jurisdiction as a whole. *Cf. DeGrandy*, ___ U.S. at ___, 62 U.S.L.W. at 4760 & n. 11 (endorsing this notion of "proportionality" between the number of majority-minority voting districts and the number of minorities in the relevant population group as a rough proxy for the equality of political and electoral opportunity that the Voting Rights Act guarantees); *id.* at ___, 62 U.S.L.W. at 4763 (O'Connor, J., concurring) (same).

The fifth and final factor asks whether the challenged plan "impose[s] an unacceptable burden on innocent third parties." *Paradise*, 480 U.S. at 182 (plurality); *see Fullilove*, 448 U.S. at 514-15 (Powell, J., concurring). The Court has invalidated the use of racial preferences in selecting employees for layoff on this ground, because it "imposes the entire burden of achieving racial equality" on innocent individuals and causes "serious disruption" to their lives and "settled expectations." *Wygant*, 476 U.S. at 283 (plurality). But the Court has held that an affirmative action plan may be "narrowly tailored" to its goal of remedying identified discrimination even though it requires innocent third parties to bear some of the burden of eradicating the effects of that discrimination. *See Wygant*, 476 U.S. at 280-81 (plurality) ("As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy"); *id.* at 287 (O'Connor, J., concurring) (an affirmative action program designed "to further a legitimate remedial purpose" is not constitutionally invalid because it forces "innocent individuals" to bear some of the burden of the remedy, so long as it "do[es] not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by [its] racial preference"); *Fullilove*, 448 U.S. at 484 (opinion of Burger, C.J.) ("such a sharing of the burden [of remedying the effects of past discrimination] by innocent parties is not impermissible"); *id.* at 514-15 (Powell, J., concurring); *see also Croson*, 488 U.S. at 509 (plurality); *id.* at 518-19 (Kennedy, J., concurring). The Court has specifically found affirmative action plans which burdened innocent individuals to some degree to be "narrowly tailored" to a compelling interest in remedying the effects of past discrimination, where those burdens were "relatively light" and "diffuse" ones that "foreclos[ed] only one of several

opportunities" and did not result in "serious disruption" of their lives or "settled expectations." *See Fullilove*, 448 U.S. at 484 (opinion of Burger, J.) (racial set-aside in government contracting); *id.* at 515 (Powell, J., concurring); *Sheet Metal Workers*, 478 U.S. at 479 (plurality) (racial goals in union membership); *id.* at 488 (Powell, J., concurring); *Paradise*, 480 U.S. at 182-83 (plurality) (racial hiring and promotion goals in public employment); *id.* at 188-89 (Powell, J., concurring). *See generally Wygant*, 476 U.S. at 283 (plurality). In such cases, the "marginal unfairness" to innocent third parties is "outweigh[ed]" by the compelling interest in eradicating the effects of past or present discrimination. *Id.*; *see Fullilove*, 448 U.S. at 515 (Powell, J., concurring).

Plaintiffs and their supporting intervenors contend that, as the panel majority in *Hays I* held, a race-based redistricting plan imposes an undue burden on innocent third parties, hence is not "narrowly tailored," if it deviates from traditional notions of geographical compactness, contiguity, and respect for the integrity of political subdivisions to a greater degree than is necessary to accomplish its compelling purpose. *See* 839 F. Supp. at 1208-09 (majority). In their view, strict scrutiny requires a court to invalidate a race-based redistricting plan whenever it finds that the legislature could have drawn some alternative plan that would have accomplished its compelling purpose while "doing] substantially less violence to traditional redistricting principles" -- both those that are constitutionally-mandated, like the "one-person, one-vote" standard, and those that are not, like geographical compactness, contiguity, and respect for the integrity of political subdivisions. *Id.* at 1208.

We agree with the district court in *Hays I* that a race-based redistricting plan imposes an unacceptable burden upon third parties, hence is not sufficiently "narrowly tailored" to survive constitutional muster, if it fails to comply with redistricting principles that are themselves constitutionally-mandated, like the "one person, one vote" standard and the prohibition against undue dilution of the voting strength of any identifiable group of voters. A plan which causes concrete and material harm to the voting rights of an identified group of persons in one of these two ways certainly imposes the sort of "unacceptable burden" on third party interests

which cannot survive strict scrutiny, even when supported by a compelling state interest. But we cannot agree that a race-based redistricting plan imposes an unacceptable burden upon third parties simply because it deviates from traditional notions of geographical compactness, contiguity, and respect for the integrity of political subdivisions, which are not themselves constitutionally-mandated districting principles, to a greater degree than a federal court may think was necessary to accomplish the state's compelling purpose.

As the Supreme Court has emphasized time and again, there is no general constitutional requirement that the states design their redistricting plans to produce districts that are compact and contiguous and that maintain the integrity of political subdivisions. *See, e.g., Gaffney* v. *Cummings*, 412 U.S. 735, 752 n. 18 (1973); *White* v. *Weiser*, 412 U.S. 783, 793-97 (1973); *see also Cline* v. *Robb*, 548 F. Supp. 128, 132-33 (E.D.Va. 1982) (three-judge court); *Cook* v. *Luckett*, 735 F.2d 912, 920 (5th Cir. 1984). Compactness, contiguity, and respect for political subdivisions are of course rational districting principles which the states *may* take into account in designing redistricting plans. *See Reynolds* v. *Sims*, 377 U.S. 533, 578 (1964); *Mahan* v. *Howell*, 410 U.S. 315, 320-30 (1973). But they are not constitutional imperatives, *see Gaffney*, 412 U.S. at 752 n. 18 ("compactness or attractiveness has never been held to constitute an independent federal constitutional requirement" for state redistricting schemes), and the Court has repeatedly rejected claims that a state redistricting plan violates the Equal Protection Clause because it sacrifices these considerations in order to achieve other legitimate redistricting objectives, such as protecting incumbents, preserving the integrity of established neighborhoods, and recognizing the voting strength of various political parties.[42]

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[42] *See, e.g., Gaffney*, 412 U.S. at 752 n. 18 (rejecting claim that plan for redistricting of state legislature violated Equal Protection Clause because it created districts whose shapes were "indecent" and split many political subdivisions, where these oddities were the result of state's legitimate policy of allocating seats in the legislature between major political parties in rough proportion to their statewide political strength); *Wright* v. *Rockefeller*, 376 U.S. 52 (1964) (rejecting claim that congressional redistricting plan violated Equal Protection clause because its "zigzag, tortuous lines" resulted in districts with highly irregular shapes and an 11-sided, step-shaped boundary between two districts, where those lines were designed to preserve the integrity of established neighborhoods); *see also White*, 412 U.S. at 793-97 (in crafting a remedy for a "one person, one vote" violation, district court abused its discretion in ordering state to adopt a redistricting plan that failed to respect "the districting preferences of the state legislature" -- including its policy of preserving the core constituencies of incumbents -- simply because it was "significantly more compact and contiguous" than the proposed alternatives).

In *Shaw* itself, all nine members of the Court expressly reaffirmed the long-standing rule that adherence to traditional notions of compactness, contiguity, and respect for political subdivisions is *not* a general constitutional requirement for state redistricting plans. *See* ___ U.S. at ___, 113 S.Ct. at 2827 (majority); *id.* at ___, 113 S.Ct. at 2841 (White, J., joined by Blackmun, J., dissenting); *id.* at ___, 113 S.Ct. at 2843 (Stevens, J., dissenting); *id.* at ___, 113 S.Ct. at 2849 (Souter, J., dissenting). And we find no indication that the *Shaw* majority intended to create an exception to this general rule that would make adherence to traditional notions of compactness, contiguity, and respect for political subdivisions a constitutional imperative for a certain class of redistricting plans: those designed to give effect to minority voting strength in order to further a compelling state interest in remedying identified discrimination in the state's electoral processes. The majority held that a state legislature's disregard of traditional notions of compactness, contiguity, and respect for the integrity of political subdivisions in crafting a plan which creates majority-minority districts is of *some* relevance in the Equal Protection analysis, because it serves (when combined with evidence of the racial makeup of the districts) as circumstantial proof that race played a sufficiently important role in the plan's design to warrant application of strict scrutiny. *Id.* at ___, 113 S.Ct. at 2826-27. But it made clear that compliance with these criteria was not to be used as the ultimate test of the plan's constitutionality. *See id.* at ___, 113 S.Ct. at 2826-27 ("We emphasize that [adherence to] these criteria [is] important not because they are constitutionally required --they are not, *cf. Gaffney* v. *Cummings*, 412 U.S. 735, 752, n. 18 (1973) -- but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines"); *see also id.* at ___, 113 S.Ct. at 2827 ("'One need not use [adherence to these criteria] ... as an ultimate standard for judging the constitutionality of a gerrymander to recognize that dramatically irregular shapes may have sufficient probative force to call for an

explanation'") (*quoting Karcher*, 462 U.S. at 755 (Stevens, J., concurring)).[43] And while the Court remarked in *dicta* that a race-based redistricting plan designed to further an interest in remedying identified discrimination *apart* from the Voting Rights Act is "constitutionally permissible only when the State 'employ[s] sound districting principles,'" *id.* at ___ , 113 S.Ct. at 2832(*quoting UJO*, 430 U.S. at 167-68 (opinion of White, J., joined by Stevens and Rehnquist, JJ.)), we think it meant only that such a plan, like any other redistricting plan, must employ *rational* districting principles that ensure fair and effective representation to all citizens, *see Reynolds*, 377 U.S. at 568 (redistricting plan that was a "crazy quilt[ ] completely lacking in rationality, ...could be found invalid on that basis alone"), be they compactness, contiguity, and respect for political subdivisions, or any of a host of other race-neutral principles -- including preservation of the core constituencies of incumbents and recognition of distinctive urban and rural interests -- which a state may legitimately and rationally take into account in designing electoral districts.[44] We therefore conclude that *Shaw*

[43] The passage from Justice Stevens' concurrence in *Karcher* upon which the *Shaw* majority relies explains that "drastic departures from compactness" and "extensive deviation for established political boundaries" are "signal[s] that something may be amiss," which, when coupled with evidence that the plan has "a significant adverse impact upon a defined ... group of voters," will suffice to establish a "prima facie showing of gerrymandering" and "shift the task of justification to the state," 462 U.S. at 754-61. But it expressly warns against using adherence to traditional notions of compactness and respect for the integrity of political subdivisions as an "ultimate standard for judging the constitutionality of a gerrymander." *Id.* at 755 & n. 15.

[44] The passage in *UJO* from which the *Shaw* majority quotes reads in full that "we think it ... permissible for a State, employing sound districting principles *such as* compactness and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority." *UJO*, 430 U.S. at 167-68 (opinion of White, J., joined by Stevens and Rehnquist, JJ.)) (emphasis added). Neither the *UJO* plurality nor the *Shaw* majority indicates that compactness, contiguity, and respect for political subdivisions are the *only* districting principles which can be considered "sound," and longstanding Supreme Court precedent makes clear that they are not. *See Gaffney*, 412 U.S. at 754 (recognizing the voting strength of political parties); *White* v. *Weiser*, 412 U.S. at 791 (preserving the core constituencies of incumbents); *Burns* v. *Richardson*, 384 U.S. 73, 89 n. 16 (1966) (avoiding contests between incumbents).

itself cannot be read to hold that a race-based redistricting plan is not "narrowly tailored" if it deviates from traditional notions of compactness, contiguity, and respect for political subdivisions to a greater degree than a federal court thinks is necessary to accomplish the state's compelling purpose.

Nor do we believe that the Supreme Court will ultimately adopt a definition of "narrow tailoring" in the redistricting context that requires consideration of whether the challenged plan deviates from traditional notions of compactness, contiguity, and respect for political subdivisions to a greater degree than is necessary to accomplish the state's compelling purpose. As one set of commentators has suggested, such a rule would "confuse the purpose of *Shaw*'s strict scrutiny standard," which is not to ensure that the state creates wise or aesthetically-pleasing districts, but to ensure that it "is not covertly pursuing forbidden ends" when it draws district lines. Pildes & Niemi, *supra*, at 584-85. It would also make little sense from a practical standpoint, for several reasons.

In the first place, compactness, contiguity, and respect for political subdivisions have little inherent value in the districting process. The ultimate purpose of legislative apportionment and redistricting is to ensure "'fair and effective representation for all citizens.'" *Gaffney*, 412 U.S. at 748 (*quoting Reynolds*, 377 U.S. at 565-66). Districts that are compact, contiguous, and respect existing political subdivisions have traditionally been thought to facilitate the realization of that goal, because they link together citizens who are likely to share common needs and interests, reduce the cost of campaigning, and make it easier for legislators to maintain close contact with their constituents. *See Prosser* v. *Elections Bd.*, 793 F.Supp. 859, 863 (W.D.Wis. 1992) (three-judge court). But, as plaintiffs' own experts have testified, there is no consensus, nor even any empirical evidence, that adherence to these criteria is *necessary* to ensure fair and effective representation. *See* O'Rourke testimony, Tr. pp. 274-75; Hofeller testimony, Tr. pp. 139-42; Niemi Dep. at 83; O'Rourke Dep. at 89-93. As the Court explained in *Reynolds*, arguments that "geographic considerations" should receive primary emphasis in redistricting, while perhaps

valid at one point in our history, are "unconvincing" today, because "[m]odern developments and improvements in transportation and communications" mean that small and compact legislative districts are no longer necessary to insure that all citizens have access to their representatives. 377 U.S. at 580. [45] Nor are compact and

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[45] There appears to be general agreement in both the United States Congress and the state legislatures that strict adherence to traditional notions of compactness, contiguity, and respect for political subdivisions in designing congressional districts is no longer appropriate today.

From 1842 to 1929, federal statutory law required that all single-member congressional districts be composed of "contiguous territory." *Wood* v. *Broom*, 287 U.S. 1, 6 (1932) (citing Reapportionment Acts of 1842, 1872, 1882, 1891, 1901, and 1911). From 1901 until 1929, federal statutory law also required them to be geographically compact. Reapportionment Act of 1901, ch. 93, § 3, 31 Stat. 733, 734; Reapportionment Act of 1911, ch. 5, § 3, 37 Stat. 13, 14. In the Reapportionment Act of 1929; however, Congress repealed both the contiguity requirement and the compactness requirement. *Wood*, 287 U.S. at 6-7. Since 1929, there have been a number of bills introduced in Congress to reimpose requirements of compactness and contiguity for all single-member congressional districts, but all have been defeated by substantial margins. *See, e.g.*, H.R. 2648, 82d Cong., 1st Sess. (1951); H.R. 970, 89th Cong., 1st Sess. (1965); H.R. 2508, 90th Cong., 1st Sess. (1967). Federal statutory law has never required that congressional districts respect the integrity of political subdivisions.

Roughly half of the states – including North Carolina – impose requirements of compactness, contiguity, and/or respect for the integrity of political subdivision lines upon their *state* legislative districts. *See* Pildes & Niemi, *supra*, at 528; N.C. Constit. Art. II. §§ 3 and 5. But only a handful impose such requirements upon their *congressional* districts, Pildes & Niemi, *supra*, at 528 & n. 140, and North Carolina is not among them. Stip. 20. And while contiguity and respect for the integrity of *precincts* and *census blocks* were among the general criteria adopted by the North Carolina General Assembly's *redistricting committees* for consideration in designing the 1990 congressional redistricting plan, neither compactness nor respect for county or municipal boundaries were. *See* Stip. Ex. 9; Fitch Testimony, Tr. pp. 719; Cohen Testimony, Tr. pp. 319.

This general legislative unwillingness to impose requirements of compactness, contiguity, and respect for political subdivisions upon congressional districts may represent nothing more than a recognition that it is virtually impossible to adhere strictly to these conventions in designing congressional districts, as opposed to state legislative districts, since the former stretch over a much larger geographic area and are subject to a more stringent "one person, one vote" standard than the latter. But it may also represent a consensus that there is less correlation between adherence to these principles

contiguous districts which respect the integrity of political subdivisions any guarantee of fair and effective representation. As *Reynolds* demonstrates, and plaintiffs' expert has conceded, even the most perfectly-shaped districts may "do great harm to fair representation," O'Rourke Dep. at 89, and "the use of highly compact districts may be the most effective way to shut out a minority from equal participation." Comment, Constitutional Challenges to Gerrymanders, 45 U.Chi.L.Rev. 845, 879 (1978). Requiring states to adhere strictly to these criteria in crafting remedial redistricting plans would thus serve "no obvious purpose." Pildes & Niemi, *supra*, at 584-85.

Second, even if compactness, contiguity, and respect for political subdivisions had some inherent value, there is no "relatively simple and judicially manageable" standard, *Davis* v. *Bandemer*, 478 U.S. at 149 (O'Connor, J., concurring in the judgment), for determining whether a particular redistricting plan deviates from these principles to a greater extent than is necessary to accomplish the state's compelling interest.[46] While it is easy enough to determine whether a district is technically "contiguous" or not, there is no principled means of determining whether a district which satisfies this threshold requirement is still less contiguous than it needs to be. Nor is there any principled means of determining whether a congressional redistricting plan, which must deviate from the boundaries of established political subdivisions to some extent in order to comply with the constitutional command that it create districts which are as nearly equal in population as is mathematically possible, *see Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969); *Karcher* v. *Daggett*, 462 U.S. 725 (1983), nonetheless fails

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and the creation of districts whose citizens share common political interests when the redistricting is for the national legislature than the state legislature, since the former deals almost exclusively with legislation that affects the state as a whole, whereas the latter is more apt to deal with legislation that affects only certain discrete geographic areas within it.

[46] Compare the *Reynolds* v. *Sims* rule of mathematical equality in district population, which serves as a "relatively simple and judicially manageable" standard for determining whether a state legislative apportionment scheme complies with the Equal Protection Clause's requirement that the votes of all citizens be given equal weight. *Bandemer*, 478 U.S. at 149 (O'Connor, J., concurring).

adequately to respect the integrity of those political subdivisions. Finally, there is no generally-accepted definition of what it means for a district to be "compact." *See* Pildes & Niemi, *supra*, at 540-59. While plaintiffs' experts and others have suggested a number of different ways in which district compactness can be measured mathematically, *see* Hofeller testimony, Tr. pp. 118-20; O'Rourke testimony, Tr. pp. 212-14; *see also Karcher*, 462 U.S. at 756-57 n. 19 (Stevens, J., concurring); R. Niemi, B. Grofman, C. Carlucci, & T. Hofeller, Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering, 52 J. Pol. 1155 (1990); Pildes & Niemi, *supra* at 553-59, there is admittedly no consensus as to which of these is most valid. *See* B. Grofman, Criteria for Districting: A Social Science Perspective, 33 UCLA L. Rev. 77, 85 (1985) ("There are many different ways of applying a compactness requirement but none is generally accepted as definitive."). And even if there were, the long experience with state-law requirements of district compactness stands as vivid testimony to the fact that these proposed measures of compactness are not "judicially manageable." *See Karcher*, 462 U.S. at 756 (Stevens, J., concurring) (state compactness requirements "have been of limited utility because they have not been defined and applied with rigor and precision"); Pildes & Niemi, *supra*, at 529-31 (state compactness requirements have been "ineffective" in producing more compact districts, because the courts have been either unwilling or unable to enforce them).[47] The inquiry suggested by the *Hays I* Court thus promises to be "so standardless as to make the [principled] adjudication of [racial gerrymandering] claims impossible," *Bandemer*, 478 U.S. at 157 (O'Connor, J., concurring), which in turn will make it virtually impossible for the state legislatures to determine what is required to make a race-based remedial plan comply with the Constitution.

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[47] The same lack of a meaningful objective measure of compactness has plagued courts attempting to implement the "geographic compactness" prong of the *Gingles* prima facie case under § 2 of the Voting Rights Act. *See* Pildes & Niemi, *supra*, at 532-46 (noting "considerable inconsistency" in approach and widespread use of "intuitive, eyeball assessments" in decisions of lower federal courts attempting to implement this requirement); P. Karlan, Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation, 24 Harv.C.R.-C.L. L. Rev. 173, 204-13 (1989) (same).

Finally, and most critically, the "narrowly tailored" inquiry suggested by plaintiffs would result in undue interference by the federal judiciary in matters that have long been thought to be the primary province of the state legislatures. From its earliest ventures into the "political thicket" of legislative reapportionment, *Colegrove* v. *Green*, 328 U.S. 549, 556 (1946) (opinion of Frankfurter, J.), the Supreme Court has hewed fast to the view that the task of redistricting is fundamentally a political one for the state legislatures, *see Reynolds* v. *Sims*, 377 U.S. at 586; *Burns* v. *Richardson*, 384 U.S. 73, 84-85, 92 (1966); *Gaffney* v. *Cummings*, 412 U.S. at 749; *Mahan* v. *Howell*, 410 U.S. at 327; *White* v. *Weiser*, 412 U.S. at 794-95; *Wise* v. *Lipscomb*, 437 U.S. 535, 539-40 (1978), into which the unelected federal judiciary should not intrude any more than is absolutely necessary to protect constitutional rights. *White*, 412 U.S. at 795. This "hands off" approach is not some accident of history, but a deliberate recognition of the fact that the process of redistricting "is fundamentally a political affair," *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring), and that the state legislatures, as the very "fountainhead of representative government in this country," *Reynolds*, 377 U.S. at 564, are the organs of government best situated to identify and strike an appropriate balance between the many different -- and often conflicting -- considerations that are at stake in it. *Connor* v. *Finch*, 431 U.S. 407, 414-15 (1977); *see Growe* v. *Emison*, ___ U.S. at ___, 113 S.Ct. at 1081 ("[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court") (internal quotations omitted); *Voinovich* v. *Quilter*, ___ U.S. at ___, 113 S.Ct. at 1157 ("Because the States do not derive their reapportionment authority from the Voting Rights Act, but rather from independent provisions of state and federal law, the federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements.") (internal quotations omitted).[48] The "narrowly tailored" analysis

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[48] It is for this reason that the federal courts, upon finding that redistricting is necessary to remedy a proven violation of federal law, have traditionally given the state legislature an opportunity to devise a plan that will remedy the violation found, before undertaking to fashion one themselves. *See White* v. *Weiser*, 412 U.S. at 794-95; *Chapman* v. *Meier*, 420 U.S. 1, 27 (1975); *McGhee* v. *Granville County*, 860 F.2d 110 (4th Cir. 1988).

suggested by plaintiffs, which would force the federal courts "to attempt to recreate the complex process of legislative apportionment in the context of adversary litigation" and embroil them in after-the-fact "second-guessing" of the wisdom of legislative judgments about how best to balance competing districting considerations that are not themselves of constitutional stature, *Bandemer*, 478 U.S. at 146-47 (O'Connor, J., concurring), is fundamentally inconsistent with this principle. We do not believe the *Shaw* majority intended to "open[ ] the door to [such] pervasive and unwarranted judicial superintendence of the legislative task of [redistricting]," *id.* at 147, and "bog[ ] [the federal courts] down in [such] a vast, intractable ... slough, particularly when there is little, if anything, to be accomplished by doing so." *Gaffney*, 412 U.S. at 750.[49]

It is one thing to tell the states that the Voting Rights Act does not give them license to engage in race-based redistricting, even with the "benign" purpose of giving effect to minority voting strength, unless they have a substantial basis for believing that such remedial action is required to comply with the Act; and that they must take care, even then, not to take race into account in drawing district lines any more than is reasonably necessary to provide minority voters the "equal political opportunity," *DeGrandy*, ___ U.S. at ___, 62 U.S.L.W. at 4760, that the Voting Rights Act requires. That is the fundamental point of *Shaw*, and it is a point well worth making, if this nation is ever to attain the goal that the Voting Rights Act itself was designed to bring about -- that is, to overcome its long history of racial discrimination in electoral politics and transform its political system into one in which the color of an individual's skin has no bearing on his ability to participate effectively in the political process. But it is another thing entirely to tell a state which *does* have a substantial basis for concluding that it must engage in race-based redistricting to comply with the Voting Rights Act that it can do so only if it draws districts whose lines are sufficiently "regular" or "pleasing" in their

[49] The voluminous evidentiary record developed by the parties in this case, which attempts to reconstruct -- some years after the fact -- the complex and compromise-ridden legislative process that led to the enactment of the challenged Plan, in order to somehow divine the precise reason for each dip and turn in the district lines, is a perfect illustration of the inadvisability of adopting the "narrowly tailored" inquiry suggested by the plaintiffs.

appearance to satisfy the aesthetic sensibilities of a handful of unelected federal judges. *Shaw* itself holds no such thing, and we do not believe its reasoning compels us to do so here.

For all these reasons, we cannot agree with the *Hays I* court that a race-based redistricting plan enacted to further a compelling state interest in complying with the Voting Rights Act imposes an unacceptable burden upon innocent third parties, hence is not sufficiently "narrowly tailored" to survive constitutional muster, simply because it deviates from traditional notions of geographical compactness, contiguity, and respect for the integrity of political subdivisions to a greater degree than a federal court later concludes was necessary to accomplish the state's compelling purpose. Instead, we believe that such a plan imposes an undue burden on innocent third parties only if it fails to give equal weight to the votes of all individuals, *see Reynolds*, unconstitutionally dilutes the voting strength of any identified group of voters, *see Whitcomb*, *Bandemer*, or is not grounded in rational districting principles which ensure that all citizens receive "fair and effective representation," *see Reynolds*, 377 U.S. at 568. So long as the plan stays within these basic constitutional boundaries, it "unsettles no legitimate, firmly-rooted expectation" on the part of any voter, *Johnson* v. *Transportation Agency*, 480 U.S. 616, 638 (1987), including the nonminority voters it places in majority-minority districts, for no voter has a legitimate right to expect that he will be placed in a district in which he is part of the majority or that his preferred candidate will win, *see Whitcomb*, 403 U.S. at 149, 154; *UJO*, 430 U.S. at 166, nor does he have a legitimate right to expect that his district will have a certain shape, *see infra* n. 60.[50]

[50] We do not agree with the dissent's suggestion, *post* at 176-77, 190-91, that to be "narrowly tailored" to a compelling interest in avoiding a violation of amended § 2, a plan which creates majority-minority districts must "incorporate" in those majority-minority districts the specific "geographically compact" minority population which led the state to believe that § 2 required it to engage in race-based redistricting in the first place. With all respect, this argument is based on a fundamental misconception of the nature of the "wrong" which § 2 forbids, and the role that the *Gingles* "geographical compactness" inquiry plays in establishing a § 2 violation.

As amended, § 2 of the Voting Rights Act forbids a state to adopt or maintain any districting plan that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42

Of course, on current doctrine, a race-based redistricting plan that complies with these requirements may cause some "stigmatic" or "dignitary" harm to the voters -- both minority and nonminority -- that it "classifies" by race. Though we believe this harm is sufficient, on that doctrine, to give those voters standing to challenge the plan, *see supra* at 20-30, we do not think it suffices to

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U.S.C. § 1973(a). Section 2(b) provides that such an impermissible "denial or abridgement of the right ... to vote" occurs where, "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [the relevant minority group] ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 1973(b). To make out a claim that a single-member districting plan results in such an impermissible "dilution" of minority voting strength, a plaintiff must show, among other things, that the relevant minority group is "sufficiently large and geographically compact" to constitute a majority in more single-member districts than the number in which it has a majority under the challenged plan. *Growe*, ___ U.S. at ___, 113 S.Ct. at 1084 (*citing Gingles*, 478 U.S. at 50-51). Such a showing that it is possible to draw more majority-minority districts than the challenged plan does, together with evidence that the minority is "politically cohesive" and that the white majority "votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate" in districts that are not majority-minority, is *necessary* to establish that the plan impermissibly "dilutes" the voting strength of a distinctive minority group, hence violates § 2. *Id.* But such a showing is not necessarily *sufficient* to establish that the challenged plan results in an impermissible dilution of minority voting strength; instead, the court may properly find a violation of § 2 only if it further finds, after assessing the probative significance of the inference arising from the three *Gingles* factors in light of all other circumstances "with arguable bearing on the issue of equal political opportunity," that the plan's lines do in fact operate to deny the minority an equal opportunity to participate in the electoral process and to elect candidates of their choice. *DeGrandy*, ___ U.S. at ___, 62 U.S.L.W. at 4758-61. The "wrong" which constitutes a violation of § 2 is therefore not that the plan fails to make a majority-minority district out of every pocket of minority voters that is sufficiently large and geographically compact, as the dissent seems to think, but that its lines, considered in light of all relevant circumstances, operate to deny the members of the relevant minority group equal political opportunity; its failure to create as many majority-minority districts as the minority's residential patterns will permit is merely one of the telltale symptoms of that wrong. *Id.* at ___, 62 U.S.L.W. at 4758-61. It therefore makes no sense to say that a race-based redistricting plan designed to avoid a potential § 2 violation cannot be "narrowly tailored" to that particular "wrong" unless the majority-minority districts which it creates incorporate the specific "geographically compact" minority population which first led the state to suspect that its existing districting scheme might violate § 2.

establish that the plan imposes an "unacceptable" burden on innocent third parties for purposes of the "narrowly tailored" prong of the strict scrutiny analysis. Congress carefully considered the burdens that the drawing of district lines to give effect to minority voting strength would impose upon the citizenry when it enacted, amended, and extended the provisions of the Voting Rights Act that require the states to take such action to remedy the effects of past and present discrimination in their electoral processes. *See UJO*, 430 U.S. at 175-78 (Brennan, J., concurring in part); *Gingles* v. *Edmisten*, 590 F. Supp. at 356-57 & nn. 17-20. *See generally* Boyd & Markman, The 1982 Amendments to the Voting Rights Act: A Legislative History, 40 Wash. & Lee L. Rev. 1347 (1983). And it made "a considered decision," *Fullilove*, 448 U.S. at 473 (opinion of Burger, C.J., joined by White and Powell, JJ.), after "substantial and careful deliberations," *UJO*, 430 U.S. at 176 (Brennan, J., concurring in part), that these burdens were not unacceptable, given the national consensus on the compelling need for "sterner and more elaborate measures" to eradicate the effects of the states' "unremitting and ingenious defiance" of the Fourteenth and Fifteenth Amendments' guarantees of racial equality in the exercise of the franchise. *South Carolina* v. *Katzenbach*, 383 U.S. at 308-09 (1966); *see McCain*, 465 U.S. at 243-48; *City of Rome*, 446 U.S. at 172-78, 180-83. We are obligated to give considerable deference to Congress' judgment on that score, *see Fullilove*, 448 U.S. at 472 (opinion of Burger, C.J.), given its "specially informed legislative competence" in the area of voting rights, *Katzenbach* v. *Morgan*, 384 U.S. 641, 656 (1966), and the fact that the Voting Rights Act is an exercise of its "specific constitutional mandate" to enforce by "appropriate" legislation the guarantees of racial equality in the Fourteenth and Fifteenth Amendments, *Croson*, 488 U.S. at 490 (opinion of O'Connor, J., joined by Rehnquist, C.J., and White, J.), a mandate which the Supreme Court has consistently recognized gives it unique and far-reaching remedial powers. *Id.* at 488; *see Fullilove*, 448 U.S. at 483 (opinion of Burger, C.J.) ("[I]n no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce the equal protection guarantees" of the Civil War Amendments); *id.* at 516 (Powell, J., concurring); *see also Metro Broadcasting*, 497 U.S. at 605 (O'Connor, J., joined by Rehnquist,

C.J., and Scalia and Kennedy, JJ., dissenting) ("Congress has considerable latitude, presenting special concerns for judicial review, when it exercises its 'unique remedial powers ... under § 5 of the Fourteenth Amendment'"). We believe that Congress "adequately struck th[e] balance" between the need for race-based redistricting as a remedy for past and present discrimination in the states' electoral processes and the burden that such measures impose upon innocent third parties when it enacted, and twice extended, "the carefully conceived remedial scheme embodied in the Voting Rights Act." *UJO*, 430 U.S. at 175 (Brennan, J., concurring). Any argument that the passage of time has thrown that balance out of kilter, or that those measures have accomplished their purpose and outlived their usefulness, is properly addressed to Congress, which has the power to call an end to the extraordinary remedial effort embodied in the Voting Rights Act, rather than to the federal courts. *See City of Rome* v. *United States*, 446 U.S. at 180-82 (specifically refusing "to overrule Congress' judgment that the 1975 extension [of § 5's preclearance requirement] was warranted" in order "to counter the perpetuation of 95 years of pervasive voting discrimination," despite "undeniable" increases in the number of African-Americans registered to vote and elected to public office since it was first enacted).

III.

Findings of Fact [51]

A. General Background

The Legislative Setting

As the General Assembly of North Carolina went about the task of congressional redistricting required by the 1990 decennial census, several extra-legislative factors, newly at work, crucially shaped its deliberative process and the legislative decisions that emerged.

First off, population growth had produced a new seat to work into the ultimate plan, hence a need to divide the state geographically into twelve districts rather than the former eleven. Stip. 19. The legislature could not, therefore, start with the then-existing congressional districts and adjust them only as required by the one-person-one-vote principle coupled with the eternal problems of incumbency protection and raw partisan politics.[52] As plaintiff-intervenor's expert witness testified, gaining a new (or losing an

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[51] At intervals in our narrative findings we cite to particular items in the evidentiary record. These references are intended to identify the most critical evidentiary support for the immediately preceding finding(s), not necessarily the exclusive support. We received much of the evidence in the record – testimonial, documentary, witness statements, discovery materials – subject to objections, and reserved rulings pending our written decision. In keeping with customary practice in bench trials, we have considered all the evidence in the record (with one exception to be noted), exercising our judgment and discretion respecting that which properly could be relied upon. *See generally* 1 McCormick on Evidence, § 60 (4th ed. 1992). For purposes of the record, therefore, all objections by the parties to any evidence received by the court can be considered now overruled by the court. The one exception is certain evidence concerning an official investigation of campaign practices during the 1990 political campaign for the United States Senate in North Carolina which, on motion of the United States, was sealed by the court. Objection to the admissibility of that evidence is sustained. It has not been considered by the court.

[52] That is, if it wanted to have a redistricting plan in place in time for the 1992 congressional primary and general elections. *See* 2 U.S.C. §§ 2a(c); 2c.

existing) seat always creates its own "turbulence" in the redistricting process. Hofeller testimony, Tr. pp. 135-36.

Next, new developments in the way that census data was organized geographically, both by the U. S. Bureau of Census and by state legislative staff, coupled with new computer technology for processing and using that data in redistricting, had created new capabilities for rapid, accurate consideration and adjustments of proposed plans, and for line-drawing not so bound, as formerly, to existing political boundaries.

Without attempting a full description of these interrelated technical developments, the dramatic new capabilities they provided for the redistricting process can be summarized. In the first place, the critical redistricting data -- total population, voting age population by race or national origin, voter registration by party and race -- was now made available by the Census Bureau and state legislative staff not only at traditional governmental levels down to townships and precincts, but even further down to the level of the "census block," a geographical unit usually smaller than precincts. Incorporated into a newly acquired computer software program along with digital map files, these allowed the rapid call-up and visual display on computer terminals of critical demographic and statistical data down to the census block level, along with geographic features -- highways, streets, rivers, railroads -- and political boundaries, including the 1980's congressional district lines, throughout the state. And, in a further refinement developed by legislative staff, precinct election results in a number of recent statewide elections were included in the computer database, making available at the precinct level partisan voting patterns that might affect particular candidacies in potential districts. The capability thus provided to call up demographic and statistical data and on its basis to make district line adjustments at this geographic level had therefore significantly increased the flexibility of the redistricting process, freeing up the planners from their former confinement to existing political boundaries in attempting to "get the numbers right," whether for basic one-person-one-vote purposes, incumbency protection, or for other purposes. Around 229,000 of these census blocks, with their associated demographic and statistical data, were now newly available for use as basic building blocks in the

redistricting process. This not only made possible a new degree of refinement in getting the numbers right (including the rather incredible achievement of mathematically perfect equal population districts), it also encouraged the drawing of boundary lines with more obvious irregularities and facial oddities than typically occurred under the less sophisticated methodology formerly available. For the new capability made it more possible than formerly it had been for the planners to yield to specific importunings for special treatment of narrowly confined local situations (such as incumbent residency) or to shift quite small numbers of desired types of voters (whether by party affiliation or race) in drawing district lines. And because the census block boundaries were either visible physical features or existing governmental unit lines, it was now possible to use them as boundary-defining portions of a district and thereby to split governmental units down to the precinct level between districts when the demands of numbers, or incumbency protection, or partisan political advantage were thought to require it. Stip. 29-33; Cohen testimony, Tr. pp. 283-86, 289-98, 412-13; Cohen Dep. 96-113; Cohen Dep. Ex. 7; generally, D. Exs. 405, 416-35.

A third factor heavily influencing the redistricting process was a recently developed perception by the Republican Party of North Carolina and members of that Party in the General Assembly, freely conceded in this litigation, that it and they could derive partisan political advantage from the creation of as many majority-minority districts as arguably could be justified by the requirements of federal voting rights law. Pope testimony, Tr. pp. 1046; Hawke Dep. pp. 15, 18-19; Farr closing arg. Tr. p. 15. This perception, and Republican legislator action upon it, gave rise to powerful political cross-currents and unusual political alignments that figured critically in the redistricting process and that in turn bear significantly upon the issues in this case.

The bicameral state legislature that developed and enacted the challenged plan was heavily white by race, Democratic by party. In the Senate there were 36 Democrats, 14 Republicans; in the House, 81 Democrats, 39 Republicans. By race, the Senate had 45 white members, 5 African-American members; the House, 105 white members, 14 African-American members and one Native

American member. Stips. 10-16. Congressional redistricting (unlike that for state legislative seats) was carried out as a shared responsibility of both houses. Bipartisan and bi-racial congressional redistricting committees were appointed for both Senate and House, that in the Senate being a sub-committee of a general redistricting committee chaired by Senator Dennis J. Winner. Senator Russell G. Walker was chairman of the Senate sub-committee, and Representatives Milton "Toby" Fitch, R. Samuel Hunt, III and Edward C. Bowen were co-chairman of the House Committee. All of these but Fitch, an African-American, were white, and all were Democrats. Stips. 24-27. They, together with House Speaker Dan Blue, an African-American, and Senator Dennis Winner, who was white, constituted what came to be the generally recognized "Democratic leadership" in devising the congressional redistricting Plan now challenged. Cohen testimony, Tr. pp. 308; Fitch testimony, Tr. pp. 661-663.

This "Democratic leadership" group, acting through the Senate and House redistricting committees, effectively directed the process that led ultimately to enactment of the challenged Plan. Their decisions from time to time as the Plan evolved were implemented at the mechanical, "line-drawing" level by the Director of the Bill Drafting Division of the General Assembly, Gerry Cohen, to whom that responsibility had been delegated. Using the computer resources above described, Cohen took his instructions from this group and translated them into district configurations that were then submitted for consideration to the redistricting committees and ultimately to the floors of the House and Senate for vote.[53] Cohen testimony, Tr. pp. 359, 379-80.

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[53] Cohen's role in the redistricting process, though that of staff employee without decisional authority, was nevertheless singular, and critical. Ultimately, every legislative decision respecting the configuration of the evolving congressional redistricting Plan was communicated to him in the form of instructions by members of the Democratic "leadership group" exercising the ultimate power of the majority party in the General Assembly. The congressional district lines that finally emerged in the challenged Plan were thus all originally drawn by Cohen, acting upon these instructions. The lines that he drew and the instructions upon which he acted therefore directly reflect the legislative intent behind their drawing and the private and public interests they were intended by the legislative majority to serve. *See Voinovich* v. *Quilter*, ___ U.S. at ___, 113 S. Ct. at 1158-59 (looking to evidence of intent of individual employed by state legislature to draft its redistricting plan as evidence of the legislative intent behind the plan). Cohen's testimony, in deposition and at trial, describing his role, the instructions he received, the reasons given him, and the action he took upon the instructions, has been extensively relied upon as an accurate, credible description of the process in which he was involved.

Basic Geographic and Demographic Features Affecting the Statewide Congressional Redistricting Process

Certain basic geographic and demographic features of the State -- knowledge of whose essentials by the General Assembly we must assume -- provided essential background for the statewide congressional redistricting process.

Total state population, by the 1990 census, was 6,628,637. Of that total, 5,008,491 (75.6%) were white; 1,456,323 (22%) were African-American; and 80,135 (1.2%) were Native American. Stip. 19; 1990 Census. This meant that each of the state's twelve districts was required by constitutional "one person, one vote" principles to have a population as close as practicable to the "ideal" district population of 552,386. Stip. Ex. 10 p. 117. *See supra* n. 5.

North Carolina has three distinctive geographic regions, each with its equally distinctive history, culture, and economy: the Mountain region, the Piedmont region, and the Coastal Plain region.

The Coastal Plain, extending inland from the Atlantic coast roughly to the geologic fall line, historically has been and remains essentially rural and agricultural. It has no city with a population of 100,000 or more, and though it has a number of smaller cities such as Rocky Mount, Wilson, Goldsboro, Kinston, New Bern, Fayetteville and Wilmington, it is not as a region heavily populated. The Mountain region, running generally westward from the front range of the Appalachians to the Tennessee line, is also predominantly rural and sparsely populated, with only one city, Asheville, of any size.

The Piedmont, the foothill region lying between the fall line and the front range of the mountains, is by far the most heavily populated of the three regions. As of 1990, it contained 54.7% of the state's population, all five of the State's cities with populations

greater than 100,000, and 47 of its 84 smaller cities and towns with populations greater than 5,000. Stuart Rpt., Fig. 1; *id.* pp. 15, 23-24. Within the Piedmont region, the "Piedmont Urban Crescent" constitutes a long-recognized distinctive subregion. Stip. Exs. 44-47. Extending through eleven counties in a general arc from Wake County at its eastern end southwestwardly to Gaston County at its western, it includes the State's five largest cities, Raleigh, Durham, Greensboro, Winston-Salem and Charlotte. Stip. Ex. 47. Substantially industrialized, predominantly urban, and containing most of the State's institutions of higher learning (including its three largest), it is rightly described as "the urban, economic and cultural heart and soul of the State." Goldfield Dep. Ex. 1, p. 2.

Of great significance to the issues in this case is the location within the state of the 22% of its population that is African-American. While African-American citizens reside in every region of the State, they are by no means evenly dispersed throughout any, nor throughout the whole state. Instead, there are major, discrete concentrations of African-American population throughout the state, the most significant ones of which, reflecting historical forces dating from slavery, are in the Coastal Plain and the Piedmont. Within the Coastal Plain, there remains a large, dense concentration (50% or above of census tract total populations), long in place, in the heavily rural, agricultural northeast; and smaller dense concentrations, also long in place, in other rural areas further south in the region and in the historic "black sections" of the country towns that are scattered across this agricultural region. Within the Piedmont, there are dense concentrations in the historic "black sections" of the state's five largest cities and of the other smaller cities -- Burlington, High Point, Thomasville, Lexington, Salisbury, Statesville, and Gastonia -- that are scattered across the Piedmont Urban Crescent, with no significant concentration in the rural areas between those cities. D. Ex. 415; Goldfield Dep. Ex. 1, pp. 8-11.

B. The Legislative Redistricting Process as Revealing of Legislative Intent and Purpose[54]

Before developing any specific redistricting proposals, the House and Senate redistricting committees conducted a total of fifteen public hearings around the state during the spring of 1991. At these, they received citizen comments and suggestions, which had been invited by public notice, about the criteria the General Assembly should use in the redistricting process, and the ethnic, geographic, economic or other communities of interest it should consider. Stips. 38-42; Stip. Ex. 200, pp. 2-3, 8; Fitch testimony, Tr. pp. 665-67.

In mid-April, 1991, the committees jointly adopted written standards to guide the congressional redistricting process. These included compliance with one-person-one-vote requirements, the federal Voting Rights Act, the Fourteenth and Fifteenth Amendments, and 2 U.S.C. § 2c's requirement of single-member districts; the use of contiguous territory; and the retention of precinct and census block integrity where compatible with the redistricting computer database. Stip. 43.

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[54] A large part of the voluminous evidentiary record produced in this case by four months of discovery, extensive stipulations of fact, and the deliberately liberal reception of testimonial and documentary evidence during a six-day trial, is devoted to the ins and outs of the laborious legislative process that led finally to enactment of the challenged Plan. The process revealed inevitably was a complicated, highly politically-charged, and ultimately, in many of its details, obscure one. The evidence depicting it was correspondingly exhaustive in its detail, as are the proposed findings of fact based upon it that have been submitted by the parties at our request. Inevitably, much of that evidence and many of the proposed findings of fact are now revealed to be in much of their detail only marginally, if at all, material to the dispositive legal issues we have identified: (1) whether the congressional redistricting Plan reflects a legislative intent deliberately to include one or more districts having a particular racial composition of voters, and (2) whether, if so, the districting so done was "narrowly tailored" to serve one or more "compelling state interests."

Our findings of fact in this section, being confined to those we consider necessary and material to resolution of those issues, are, in consequence, much more selective and "ultimate" than are the findings proposed by any of the various parties.

As these adopted criteria indicate, the committees were well aware that one of their principal considerations must be compliance with provisions of the Voting Rights Act and the federal constitution that protect racial minorities in matters of redistricting. To give special guidance in this area, the General Assembly had, in fact, employed special legal counsel experienced in voting rights litigation, who worked closely throughout with those directing the redistricting process. L. Winner Dep. pp. 38-39.

In the early stages of their deliberations, there was division within the councils of the Democratic leadership as to whether any majority-minority congressional districts need, and should, be drawn. There was sentiment within the Senate leadership group that none should be drawn, in the main because it would benefit the Republican Party. D. Winner Dep. pp. 13-15; Fitch testimony, Tr. pp. 665. There was opposing sentiment in the House committee that two could, and must under the Voting Rights Act, be drawn. And on the Republican side, there was a concerted move to encourage the drawing of two. Stips. 49, 54, 61; Cohen testimony, Tr. p. 461.

In the end, the Democratic leadership group came to the conclusion, presumably driven in part by the advice of legal counsel, that at least one such district must be included in the plan. Fitch testimony, Tr. pp. 665, 670-671. To this end, the redistricting committee chairmen then prepared a number of "base plans" which, beginning in May 1991, were presented to these committees, at a public hearing, and finally on the House and Senate floors. All included one majority-minority district centered on the large rural area of proportionately dense African-American population in the northeastern portion of the Coastal Plain, with an arm extending westwardly to include an African-American population concentration in the inner-city of Durham, on the eastern end of the "Piedmont Urban Crescent," and another arm extending southwardly into the center of the Coastal Plain. Stip. Ex. 10, pp. 44-49. At the same time that these committee base plans were being considered, several Republican-sponsored alternative plans with two majority-minority districts were also being considered. In each of these plans, one of those majority-minority districts was located in the same area as the one included in all the committee-

proposed base plans -- in the northeastern and central portion of the Coastal Plain. Location of the second such district varied among the Republican plans, but the one receiving most support was that in the "Balmer Congressional 6.2" plan, which ran from downtown Charlotte at the western end of the Piedmont Urban Crescent southeastwardly approximately 200 miles through all or portions of a number of rural counties along the South Carolina border (Union, Anson, Richmond, Scotland, Robeson, Columbus, Brunswick, and New Hanover) across the Coastal Plain into downtown Wilmington on the coast. Stip. Ex. 10, 23, 27. The achievement of a majority of minority voters in this proposed district depended upon aggregating the African-American voter population with the substantial Native-American (Lumbee Indian) population primarily concentrated in Robeson County. Cohen testimony, Tr. p. 412; Fitch testimony, Tr. pp. 682-684.

In any event, all of the Republican-sponsored two-majority-minority-district plans which went to floor vote were rejected on party-line votes, with all the African-American legislators voting against them. The plan eventually enacted, in mid-summer 1991, as Chapter 601 of the 1991 Session Laws, was a conference committee modification of the redistricting committees' several base plans which included the single majority-minority district centered in the rural northeast and central portions of the Coastal Plan with an arm extending westward into the inner-city precincts of Durham. Stip. Ex. 10, pp. 44-49. This plan was supported by an overwhelming majority of the Democratic legislators, including all the African-American legislators. Stips. 55-60, 62-63. Stip. Exs. 17-18.

In submitting Chapter 601's redistricting plan for preclearance by the Attorney General under § 5 of the Voting Rights Act, the state's supporting materials defended its provision of a single majority-minority district against objections lodged to it by the ACLU, national and state Republican Party officials, Republican members of the General Assembly, and other groups, that its failure to provide two such districts should deny it preclearance. The thrust of the State's submission was that the enacted plan, with its single majority-minority district, should pass muster under § 5 because it neither reflected a racially discriminatory purpose nor any retrogressive effect, nor would it

result in a clear violation of § 2 of the Voting Rights Act. Stips. 64-65, 67-68; Stip. Ex. 21. In advancing this position, the State also emphasized the negative aspects of the various two-majority-minority district plans that had been proposed as alternatives to the enacted plan, and contended that adoption of none of those plans was required to warrant preclearance under § 5. Cohen testimony, Tr. pp. 311-17; Stip. Exs. 24-26.

Following up on the State's written submission, members of the Democratic leadership group, Speaker Dan Blue, Senator Dennis Winner and Representative Toby Fitch, met with U.S. Department of Justice officials on two occasions, in September and December, 1991, to press for preclearance. Stips. 70, 71. All members of this delegation urged that preclearance was warranted under § 5, despite Senator Winner's continued private belief that no majority-minority districts were legally required, D. Winner Dep. pp. 13-15, and Representative Fitch's private belief that two should have been included and might yet be required to comply with the Voting Rights Act. Fitch testimony, Tr. p. 665. During this same period, the Republican leadership in the General Assembly and Republican Party officials at the state and national levels were actively urging Justice Department officials to deny preclearance on the basis that the plan failed to include two majority-minority districts, which they believed to be required by the Voting Rights Act. Pope testimony, Tr. pp. 1048-54; Pope Dep. pp. 139-47; Stip. 69; Stip. Exs. 22, 23.

On December 18, 1991, the Attorney General objected to and refused to preclear the congressional redistricting plan enacted as Chapter 601 (as well as the State's House and Senate redistricting plans), finding that the state had not met its burden, under § 5, of proving that the Plan did not have a racially-discriminatory purpose. The Attorney General's objection letter explained the basis for this conclusion. The letter began by noting that "the proposed configuration of the district boundary lines in the south-central to southeastern part of the state appear to minimize minority voting strength given the significant minority population in this area." It noted further that the General Assembly "was well aware of the significant interest on the part of the minority community in creating a second majority-minority congressional

district in North Carolina," and that it had before it several alternative plans that provided for a second majority-minority district in the south-central to southeastern part of the state -- some of which utilized "boundary lines that were no more irregular than [those] found elsewhere in the proposed plan" -- but that it had dismissed the possibility of creating two majority-minority districts for reasons that appeared to be "pretextual." The letter concluded that the General Assembly's "decision to place the concentration of minority voters in the southern part of the state into white majority districts" appeared to be designed "to ensure the election of white incumbents while minimizing minority electoral strength." Stip. 72, Stip. Ex. 27.

The Attorney General's contemporaneous objection to and refusal to preclear the State's House and Senate redistricting plans also emphasized a belief that the legislature intentionally had acted to protect white incumbent interests by improperly minimizing minority voting strength in a number of identified instances. Stip. 72; Stip. Ex. 27.

The Attorney General's refusal to preclear the congressional redistricting plan in Chapter 601 presented the legislature with a difficult decision. It could yield to the official objection and enact a new plan with two majority-minority districts, or it could seek a declaratory judgment from the United States District Court for the District of Columbia preclearing Chapter 601. Stip. Ex. 21. On this difficult issue, powerful conflicting views were brought to bear both from within the legislature and from without. From outside, several of the incumbent Democratic Congressmen who feared any revisions of their present districts encouraged the State to litigate, Stip. Ex. 20, while the Republican congressional delegation, which welcomed the prospect of such revisions, actively discouraged it. Stip. 73; Stip. Ex. 200, pp. 594-596. Within legislative ranks, there were comparable conflicting views, from a variety of motives. The Democratic leadership was not as one on the matter. While its members had come together, despite some private misgivings, to support preclearance of the Chapter 601 single majority-minority district plan, those misgivings now led them to be of different minds about the proper course of action now that preclearance had been denied. Some, believing that the Justice Department itself was

simply trying to further partisan Republican interests by requiring two remedial districts, favored litigating the issue. Cohen testimony, Tr. pp. 321-322. Others, who had favored two districts all along as simply the right thing to do, but had been willing to compromise on one to achieve party consensus, now urged yielding to the Attorney General's objection. Fitch testimony, Tr. pp. 674-675.

In the end, the decision was made not to challenge by litigation the Attorney General's refusal to preclear. Various factors, reflecting various viewpoints shared by different groups of legislators, dictated the decision. A principal one was the sheer expense and uncertainty of seeking preclearance by litigation, carrying as it would the unavoidable twin risks that the State's declaratory judgment action might fail, and that even if it succeeded, it might only result in the State's then being faced with further litigation in the form of an action by minority voters challenging the now-precleared Plan under § 2 of the Voting Rights Act. Stip. Ex. 200, pp. 596-98 (Ballinger, Hunter statements). Another factor strongly urged by both Democratic and Republican legislators and Congressmen (though undoubtedly from different motives) was the need to have a Plan in place in time for the regularly scheduled 1992 electoral process. Fitch testimony, Tr. p. 675; Stip. Ex. 200, pp. 596-97 (Ballinger, Hunter statements). Finally, there was a substantial body of opinion that the Attorney General's objection should be yielded to simply because it was legally right or so probably right that it should in prudence and right be accepted as dispositive. Fitch testimony, Tr. p. 674; Stip. Ex. 200, pp. 907 (remarks of Sen. D. Winner), 1242 (remarks of Rep. Balmer).

Inevitably, a variety of individual and group views and motives lay behind the General Assembly's decision to forego declaratory judgment litigation and proceed to enact a congressional redistricting plan that deliberately would include two majority-minority districts. There was some patently honest sentiment, among both white and African-American legislators, that in view of the State's long history of race discrimination in voting matters persisting down to the present time, simple racial justice warranted it. Stip. Ex. 200, p. 921 (remarks of Sen. Hunt in floor debate); pp. 923-24 (remarks of Sen. Ballance in floor debate); p. 932 (remarks

of Sen. Walker in floor debate). This was, indeed, the sentiment expressed in debate by those Republican legislators who then favored that course of action, whatever their true motivation, as later revealed in this litigation, may have been. Stip. Ex. 200, p. 1268 (remarks of Rep. Flaherty in floor debate); *id.* p. 919 (remarks of Sen. Shaw in floor debate).

Beyond any question, however, the dominant concern driving the decision not to challenge the denial of preclearance in court was a perception that -- contrary to the position taken by the Democratic leadership at the time the Chapter 601 plan was enacted (and the position advanced by the state in its efforts to obtain preclearance for it) -- the Chapter 601 plan, and any other congressional redistricting plan which did not contain at least two majority-minority districts, would in fact violate the Voting Rights Act (or be so likely to violate the Act that in prudence it must be assumed to do so). The General Assembly that decided to abandon Chapter 601 and enact Chapter 7 in its stead was without doubt aware of the circumstances under which a congressional redistricting plan could be found to violate the Voting Rights Act. This was, after all, a General Assembly with powerful, recent institutional and individual memories of the Act's rigor in redistricting matters. Well over half the members of the 1991 General Assembly had been members of the 1986 General Assembly, which had been required by a federal court in the *Gingles* litigation to create 8 State House and Senate majority-minority districts in order to remedy violations of amended § 2. N.C. Manual, 1991-92. In addition, 58 had been members of the 1981 General Assembly, *id.*, whose original congressional redistricting plan had been denied § 5 preclearance on the ground that its exclusion of Durham County, with its politically-active black community, from then-Congressional District 2 appeared to have both the purpose and the effect of diluting minority voting strength. D.I. Ex. 501, pp. 34-53 (Kousser Rpt.); Stip. Ex. 195 (letter denying preclearance).[35] Finally, all were aware that the

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[35] As the denial letter by then-Assistant Attorney General William Bradford Reynolds explained, during a period when black population was increasing statewide, that in Congressional District 2 -- "the only district where black voters could have the potential for electing a candidate of their choice" -- had been decreasing over the past several redistrictings -- from 43% before the 1971

Republican Party, the ACLU, and other groups had contended that the Chapter 601 plan did not comply with the Act because it failed to include two majority-minority districts, and that the Justice Department, the agency assigned by Congress to enforce the Act, had declared, after reviewing these objections, that the plan actually did fail to pass muster under § 5. Stip. Ex. 27. Because of these recent experiences with Voting Rights challenges to earlier redistricting plans, the General Assembly that enacted Chapter 7 was necessarily aware of the general nature of the showing required to make out a *prima facie* § 2 challenge to a congressional redistricting plan, as well as the general nature of the showing that a state must make to establish that such a plan satisfies the § 5 standard.

The General Assembly that enacted Chapter 7 was also specifically aware -- from evidence presented to it by the Republican Party, the ACLU, and others; from advice received from the Justice Department and its own redistricting experts; and from its members' own personal knowledge of North Carolina politics -- that conditions in North Carolina were such that the African-American minority could very likely make out a *prima facie* § 2 challenge to the Chapter 601 plan or, for that matter, to any other Plan that did not contain two majority-minority districts. Numerous plans presented to the General Assembly had demonstrated that the state's African-American population was sufficiently large and geographically compact to constitute a majority in two congressional districts: *See* Stip. Ex. 10, pp. 50-54 ("Balmer Congress 7.8"); pp. 55-59 ("Balmer Congress 8.1"); pp. 60-65 ("Optimum Congressional II-Zero"); pp. 66-72 ("92 Congress 1-"Peeler Plan"); pp. 81-94 ("1992 Congressional Base Plans ##7 and 8"); pp. 95-106 ("Representative Flaherty's Congress Plan"); pp. 107-120 ("1992 Congressional Base Plans ##9 and 10"). Members of the legislative leadership stated in floor debate that they believed the state's African-American population was large enough to constitute a majority in two congressional districts, that it was politically cohesive, and that pervasive bloc voting by the white majority allowed it usually to defeat candidates supported by the African-American minority in districts that were not majority-

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redistricting to 40.2% after it, and down to 36.7% under the 1981 plan as submitted. Stip. Ex. 195 (Reynolds ltr. to Brock, p. 3).

minority. *See* Stip. Ex. 200, pp. 921, 923-24, 932 (Senate floor debate statements of Senators Hunt, Ballance, Simpson, and Walker). Special counsel to the Republican Party, experienced in redistricting litigation, specifically warned the General Assembly at a public hearing that conditions in the state were such that failure to create two majority-minority congressional districts might well result in "turning over the drawing of districts to a federal court." Stip. Ex. 200, pp. 597-98 (statement of Robert Hunter). The Justice Department's letter denying preclearance to the Chapter 601 plan stated that it believed that two majority-minority congressional districts meeting the *Gingles* criteria could be drawn in North Carolina, and that the Chapter 601 plan's failure to do so constituted an impermissible dilution of minority voting strength. Stip. Ex. 27. In addition, the General Assembly was necessarily aware, from its members' own personal experiences in North Carolina politics, that conditions in North Carolina were such that the African-American minority could likely prove many of the other factors that are relevant to establishing a § 2 violation under the statute's "totality of the circumstances" approach: the state had a long history of official voting-related discrimination; its African-American minority continued to bear the socio-economic effects of past discrimination, which hindered its ability to participate effectively in the electoral process; racial appeals continued to be used in its electoral campaigns; African-Americans were still not being elected to political office in the state in numbers even remotely approaching their representation in the general population, despite the fact that capable and experienced African-American candidates were running for election; and the Chapter 601 plan (or any other plan that created only one district in which African-Americans were a majority) would not give African-Americans a majority in a number of congressional districts that was anywhere close to proportional to their share of the state's population as a whole. *See* Stip. Ex. 200, pp. 921, 923-24, 932 (excerpts of Senate floor debates); Daughtry Dep. pp. 54-60, 63; Fitch Dep. pp. 65-69.

The validity of this general perception by the legislature (or at least its leadership) that the African-American minority could make out a *prima facie* § 2 case with respect to any congressional redistricting plan that did not include two majority-minority districts

was confirmed by objective evidence adduced at trial.[56] The overwhelming evidence established that the state's African-American population was sufficiently large and geographically compact to constitute a majority in two congressional districts; numerous examples of plans drawing two majority-minority districts were presented to the court, *see* Stip. Ex. 10, including several prepared by the Plaintiff-Intervenors in which the majority-minority districts themselves were "geographically compact" under any reading of *Gingles*. P.I. Ex. 301, Tabs 2 and 3 ("Shaw II" and "Shaw III"). There was undisputed evidence that the state's African-American population was politically cohesive. D. Ex. 404 (Engstrom Rpt.). Finally, there was considerable evidence that, although African-American electoral candidates' success, or near success, in both state-wide and local elections had continued the gradual improvement noted by the *Gingles* district court in 1984, *see* 590 F.Supp. 345, 364-65 (E.D.N.C. 1984) (three-judge court), *aff'd in part, rev'd in part on unrelated grounds sub nom., Thornburg* v. *Gingles*, 438 U.S. 30 (1986), racial bloc voting still persisted to a significant degree across the state in both local and statewide elections, including those for United States Congress. D. Ex. 404 (Engstrom Rpt.);Watson Dep.; Weber Dep. pp. 668-71. So also did racial appeals and tactics in political campaigning.[57]

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[56] Plaintiffs and Plaintiff-Intervenors objected to the admission of any evidence of continued racial bloc-voting, racial appeals in political campaigns, or other factors relevant to the establishment of a § 2 violation that was not specifically before the General Assembly, on the basis that it was irrelevant to any issue of legislative purpose or intent at the time the challenged Plan was enacted. We disagree. The evidence is relevant for the purpose of validating as non-pretextual the contemporaneously expressed belief of the legislative leadership that the Voting Rights Act compelled its action. Surely, had there been contrary evidence -- that there was no objective basis for believing the action compelled by § 2 or § 5 of the Voting Rights Act -- it would have been highly relevant -- and surely proferred -- to demonstrate that there was no basis in fact for such an assumption. We have therefore considered the evidence as relevant for this purpose, though we do not believe it critical to proof of the material fact at issue -- whether the legislature had a firm basis for believing its action legally compelled.

[57] Though there are other examples in the record, two suffice to demonstrate this regrettable fact. In the closing stages of the 1990 general election campaign for the United States Senate between the white incumbent, Jesse Helms, and his African-American opponent, Harvey Gantt, the Helms campaign made extensive use of a television ad which directly appealed to white voter resentment of affirmative action programs in employment. D.I. Ex. 549; Watt testimony, Tr. p. 920. During that same campaign, African-American voters were targeted with a massive mailing of post-cards which identified the sender as the Republican Party and contained misinformation about state voting law residence requirements that was deliberately designed to chill African-American voting. D.I. Ex. 522-24.

In addition, the General Assembly that enacted Chapter 7 was obviously specifically aware that the Justice Department had denied preclearance to its predecessor, the Chapter 601 plan, on the express ground that it failed to satisfy the "purpose" prong of § 5. Stip. Ex. 27. And it was aware -- from evidence presented to it by the Republican Party, the ACLU, and others; from advice received from the Justice Department and its own redistricting experts; and from its members' own personal knowledge of the factors that went into the creation of the Chapter 601 plan -- that the Justice Department's conclusion was legally and factually supportable. *See* Stip. Ex. 200, pp. 921, 923-24, 932 (excerpts of Senate floor debates).

A final factor may well have tipped the decision of the Democratic leadership to accept the Attorney General's refusal to preclear the Chapter 601 plan and enact an alternative plan that would address the Attorney General's concerns by creating two majority-minority districts. It concerned the location of the additional remedial district that would have to be provided in such a plan. All the Republican-sponsored two majority-minority district plans that had been formally proposed during the 1991 Session and were again being proposed located that second district in areas decidedly unfavorable to Democratic interests. Particularly unfavorable was the one specifically suggested by the Attorney General, the Charlotte-to Wilmington district of the "Balmer Congressional 6.2" plan. Such a district would take critical areas of the then Seventh District of Democratic Congressman Rose and the Eighth District of Democratic Congressman Hefner and threaten their seats. Stip. Ex. 10, pp. 27-37. Furthermore, it was disfavored by African-American legislators who believed -- with good reason -- that the African-American and Native American voting populations whose aggregation was required to yield an effective voting majority in the proposed district were not in fact politically cohesive. Cohen testimony, Tr. pp. 380-81, 385-86. Concern about the location of

the additional district therefore was a significant factor in the Democratic leadership's debate over whether to yield to the Attorney General's refusal to preclear their single remedial district plan.

During the critical period of this debate, an alternative location that favored rather than disfavored partisan Democratic interests surfaced. Ironically, it had been first suggested in a plan proposed by Republican Representative Balmer to the House Redistricting Committee co-chairmen back during the 1991 regular session. Never formally considered at that time, but made a part of the legislative record by Balmer as "Balmer Congress 8.1," it located a second remedial district in a narrow band running through the Piedmont Crescent, linking the historic "black neighborhoods" of the Piedmont cities along its course. Stip. Ex. 10, pp. 55-59. As described by Balmer in a letter to the Attorney General urging denial of preclearance to the Chapter 601 plan with its single remedial district, it "stretched from the black neighborhoods of Charlotte to the black neighborhoods of Durham." And, according to Balmer's letter, its configuration demonstrated how the Chapter 601 plan, by failing to include such a district, "submerged black voting potential" in this area. Stip. Ex. 23 (Balmer-Dunne ltr., pp. 7-8).

This idea of locating the second remedial district entirely within the Piedmont Crescent was picked up at some point during the interval by Democratic Representative Hardaway. He included a slight variant of the Balmer 8.1 districts along with a variant of the Chapter 601 First District in a plan, "Optimum Congressional II-Zero," which he submitted for committee consideration in its ongoing debate. Stip. Ex. 10, p. 60-65. Once revealed, the basic design of the Hardaway plan attracted immediate support among the Democratic leadership group, incumbent Democratic congressmen threatened by the Charlotte-to-Wilmington district, and civil rights organizations. A modified version containing variants of both districts in the plan quickly emerged as the result of consultations among aides to incumbent congressmen and members of the redistricting committees. Endorsed by the National Committee for an Effective Congress and the North Carolina NAACP, this modified plan, now popularly referred to as the "Merritt Plan" (for John Merritt, a political ally of Congressman Rose who had worked

extensively on it) or the "Peeler Plan" (for Mary Peeler, Executive Director of the North Carolina NAACP), it was formally proposed by Ms. Peeler at a public hearing conducted by the redistricting committee on January 8, 1992. Stip. 85, Cohen testimony, Tr. pp. 324-29; Stip. Ex. 10, pp. 60-65.

For the Democratic leadership, this Merritt/Peeler Plan had two great virtues which figured significantly in the decision to enact a plan with two remedial districts rather than challenge the denial of preclearance in court.

First, this plan perfectly trumped the Republican-favored plan with its Charlotte-to-Wilmington district which would effectively have packed the bulk of the state's heavily Democratic African-American vote into two Congressional districts located in already Democratic-leaning areas. In direct contrast, locating one of the remedial districts in the Republican-leaning Piedmont Crescent would insure that its traditionally African-American vote, now a potential majority, would no longer be diffused (or "submerged," in Representative Balmer's characterization) in a Republican (hence, under present circumstances, white) majority voting population. Fitch testimony, Tr. pp. 675-78; Cohen testimony, Tr. pp. 330, 396.

Second, it would permit the creation of two remedial districts having the distinctive and different urban and rural characteristics and communities of interest which historical forces had shaped for the state's African-American population. This would accommodate suggestions of citizens at public hearings, and of legislators in floor debate, that the observance of distinctive urban and rural communities of interest should be a prime consideration in the general redistricting process. Stip. Ex. 200, pp. 2, 3 (public notice inviting comments), 198 (Walker statement), 212 (Mills statement), 245 (Tillman statement), 600 (Hunter statement), 603 (Kimbrough statement), 820 (Sen. D. Winner), 1003 (Rep. Hasty). And it would accommodate an expressed desire of African-American legislators and citizens from the rural Coastal Plain area that the remedial district centered in that area should not include urban African-American populations in the easternmost Piedmont Crescent cities of Durham and Raleigh. These were thought not to

share the predominantly rural, agricultural interests of the region, but likely to dominate such a district politically because of their much stronger political traditions. Fitch testimony, Tr. pp. 670-75.

For all these reasons, the Democratic leadership adopted the Merritt/Peeler Plan as its first base plan, "92 Congress I," for implementing its decision to enact a congressional redistricting plan with two majority-minority districts. Stip. Ex. 10, pp. 66-72. It was that plan which then evolved, preserving its basic design for the location of the two districts, into the enacted Plan now challenged. The process of its evolution involved different, but necessarily interrelated, sets of problems respecting the two districts. The working out of those problems determined the final shapes and locations of both. Because of the claimed centrality of their shapes and locations to the issues in this case, the process is best traced out separately as to each. Though vastly complicated in detail, its basic outlines are essentially undisputed and can be summarized.

To implement the basic decision to create a distinctively rural majority-minority district in the Coastal Plain region, the redistricting committees adopted the convention that at least 80% of its population must be located outside cities having populations greater than 20,000. This convention was observed by Cohen, using "places reports" detailing the exact location of persons within particular areas, to verify adherence. Cohen testimony, Tr. pp. 333, 356-58. It had been assumed from the outset, starting with Representative Hardaway's plan, that the rural district should be centered, as was the single remedial district in the Chapter 601 plan, on the large, proportionately dense African-American population in the northern part of the Coastal Plain. Stip. Ex. 10, p. 62. But if the other, urban district was to include the African-American population of inner-city Durham, and the rural-urban distinction between the two districts was to be observed, the First District must be extended still further southward in the Coastal Plain to compensate for loss of the urban Durham population. Cohen testimony, Tr. pp. 355-56; Fitch testimony, Tr. pp. 676-78.

Extending it southward presented both difficulties and advantages for the overall design. Its difficulties lay in the need to avoid extensive destruction of the cores of the districts of incumbent

Democratic Congressmen Valentine (Second), Lancaster (Third), and Rose (Seventh), all of which lay to the south. This difficulty already had been encountered in constructing Chapter 601's single remedial district. Even with that district's inclusion of the African-American population in Durham, southward extensions from its core into portions of the existing Second and Third Districts had required substantial realignment of those districts. Stip. Ex. 10, p. 45 (Chapter 601 plan); Stip. Ex. 61 (1982 Congressional Districts). The need for still further extensions in that general direction posed the threat of still further realignments of those two districts and, depending upon its exact configuration, even of Congressman Rose's Seventh District in the southeastern corner of the Coastal Plain. *Id.* It was in part at least because of that threat of even further realignments of their districts if Chapter 601's plan were not precleared that these three Congressmen had urged the state to seeks its preclearance by litigation. Stip. Ex. 20. With that possibility now gone, these same Congressmen now sought by renewed consultations with the redistricting committee members and staff to protect their interests against unfavorable realignments in the drawing of the new Coastal Plain remedial district. Cohen testimony, Tr. pp. 358, 360, 388-92; D. Ex. 425, 426, 429, 430.

A compensating advantage of extending the First District even further southward was that by this means the Attorney General's objection that the African-American population in the south-central and southeastern portions of the state were not sufficiently taken into account in the Chapter 601 plan might be met. Cohen testimony, Tr. pp. 365-66; D. Ex. 441.

It was the interaction of these problems of protecting incumbents while meeting the equal population requirements, achieving effective African-American voting majorities, attending to the Attorney General's objections to the rejected plan, and observing the committees' contiguity criterion that produced the sprawling, peculiarly-shaped First District in the challenged Plan. Its overall sprawl -- its sheer volume -- resulted mainly from the need to include in it 552,386 persons out of a generally sparsely-populated rural region of the state, coupled with the decision to find at least 80% of them outside cities with populations in excess of 20,000. Its sprawls in detail -- and it has many -- resulted from a variety of

reasons: to include historic "black sections" in various of the towns and small cities -- including Fayetteville and Wilmington -- scattered across the essentially rural, agricultural Coastal Plain; to preserve politically-critical core areas in the districts of three politically-affected incumbent Congressmen and to avoid pairing any of them in realigned districts; and in the process to maintain the territorial contiguity required by the committee criteria. Cohen testimony, Tr. pp. 329-400, *passim.*

Many oddities of shape resulted. A great number can be laid most directly to incumbent protection. Several examples suffice to illustrate.

Though the home precincts of both Congressman Valentine in Nash County in the existing Second District and of Congressman Lancaster in Goldsboro in the Third were heavily (45%) African-American and were geographically situated for ready inclusion in the First District, they were retained, as were their entire counties, in their existing districts. To compensate, the First District had to be extended much further southward to include rural portions of Columbus and Bladen Counties with comparable African-American populations. Cohen testimony, Tr. p. 364.

The highly irregular shape of the southeast portion of the district, with its two narrow extensions into historic "black sections" of Fayetteville and Wilmington, resulted directly from the effort to preserve the core of Congressman Rose's Seventh District. These extensions represent the minimum possible territorial intrusions into two key counties, Cumberland and New Hanover, which formerly had been entirely in his district, that were thought needed to achieve the requisite African-American population for the district.

Perhaps the most striking illustration of the effects of incumbent protection upon the final irregularity of the First District's shape was the use of a "double cross-over" -- a point of contiguity that allows two districts essentially to cross over each other -- to allow in this case the southern extension of the First District to cut across Congressman Lancaster's existing Third District in Duplin County without destroying the technical contiguity of either district. Stip. Ex. 42; P-I Ex. Map 1; D. Ex.

419. Its purpose, as explained by Cohen, was to retain critical portions of Sampson County lying to the west of this cross-over in Lancaster's Third District, as part of a larger purpose to avoid pairing in the same district any of the incumbent Democratic Congressmen who could be affected by the First District's final configuration: Valentine (Second), Lancaster (Third), Rose (Seventh), and Hefner (Eighth). Cohen testimony, Tr. pp. 348-49. Other examples of irregularities of shape driven largely by concerns for incumbent protection abound in the record.

The evolution of the Twelfth District, from its earliest precursor in Representative Balmer's 1991 "Congress 8.1" plan, through Representative Hardaway's "Optimum Congressional II-Zero" plan and the "92 Congress I/Peeler" plan, into its final form in the challenged Plan, followed the same general pattern as did the First District's. The same combination of factors -- though with varying degrees of influence -- determined this district's eventual location and shape. Again, though the process was complicated, its essentials for purposes of this case are largely undisputed and can be summarized.

Carrying through the idea of a predominantly urban district counterpart to the predominantly rural First District, the redistricting committees adopted a mirror-image convention to guide the Twelfth District's urban design: at least 80% of its total population must be drawn from cities with populations of 20,000 or more. Cohen testimony, Tr. pp. 333-35, 430-33, 536; D. Exs. 405, 406, 407. In the course of the district's evolution, this convention dictated the removal from the "92 Congress I/Peeler" base plan of large portions of four basically rural counties -- Caswell, Person, Granville, and Vance -- along the Virginia border, and the addition of historic "black neighborhoods" in the inner cities of Gastonia and Winston-Salem, the only Piedmont Crescent cities meeting the 20,000 criterion that were not included in the district in the original base plan. Cohen testimony, Tr. pp. 334, 341-42, 350-51. In the end, the design that resulted carried through a simple notion: to link the significant concentrations of African-Americans in the historic "black neighborhoods" of the various towns and cities closely strung along the Piedmont Crescent, achieving the required effective minority-race voting majorities by connecting these inner-city

concentrations with narrow corridors designed to achieve the purpose of the predominantly urban convention. This produced a district which included portions of all the cities of this sub-region having populations in excess of 20,000, including four of the state's five largest. In its final form, the basic design therefore was that of a narrow, jagged band that stretched from inner-city Gastonia to inner-city Durham. Cohen testimony, Tr. pp. 331-35, 343, 350-52, 356-58. And within this basic design there were further detailed oddities and irregularities of shape that have, of course, been extensively emphasized in descriptions of this district in various contexts. Most of these, just as those in the First District, can be traced in whole or part to concerns for incumbent protection, achieving required minority-race voting majorities, and maintaining technical contiguity both within the district and within other districts intersected by the Twelfth District's basically ordered long, narrow course through the Piedmont Crescent. Chief among these, and sufficient for our purposes to illustrate the point, are the several "point contiguities" and "double cross-overs" that exist in the district's design. The "point contiguities" occur in the narrow corridors used to link the "black neighborhoods" which provide the principal African-American population concentrations of the district. They occur when the political or census block boundaries that are being used to define the boundaries of such a corridor happen to touch only at a single "point." They serve no independent redistricting purpose and could be avoided by the simple but meaningless cosmetic device of "splitting" the connecting political or census block units just enough to continue the corridor on a front of any measurable width. Stip. Ex. 42; Cohen testimony Tr. pp. 482-86. "Double cross-overs," however, are point contiguities with a purpose. Those in the Twelfth District serve the same general purpose as the one in the First District. Stip. Ex. 42, pp. 1-3; Cohen testimony, Tr. pp. 482-86. They permit the narrow remedial district to run completely across the existing district of an incumbent Congressman (here, Republican Congressman Coble's Sixth District) in a way that preserves the existing district's core portions while maintaining the technical contiguity of both.

The General Assembly enacted the challenged Plan, with its majority-minority districts in their final forms, as Chapter 7 of the 1991 Extra Session Laws, on January 24, 1992. The vote was

along partisan political lines. The overwhelming majority of Democratic legislators, including all the African-Americans, voted in favor of the Plan. Stips. 94-95; Stip. Ex. 36. Chapter 7 was precleared under § 5 of the Voting Rights Act on February 6, 1992. Stip. 98; Stip. Ex. 39.

The two remedial districts that resulted from this legislative process have several significant characteristics. First off, there is the obvious fact -- in many ways the central fact of this litigation-- that the shapes of both are highly irregular and geographically non-compact. Laying aside the litigation-spawned pejoratives -- "bizarre," "grotesque," "ugly," etc. -- they are highly irregular and geographically non-compact by any objective standard that can be conceived, including the shapes of all earlier North Carolina congressional districts running back to 1790, Stip. Ex. 53; the shapes of all other districts in the challenged Plan (even including those most directly affected by shared irregularities of boundary), D. Ex. 419; and virtually all mathematical measures of geographical compactness devised by social scientists, which reveal them to be among the least geographically compact of all recent congressional districts in the country. Hofeller testimony, Tr. pp. 122. And, they are not the two most geographically compact remedial districts that could have been drawn -- if no other interests were considered. Hofeller Testimony, Tr. pp. 123-125; P-I Ex. 301 Tabs 1-3 ("Shaw II" and "Shaw III" plans).

But the districts also plainly possess the distinctively rural (First) and urban (Twelfth) characteristics intended, as contemporaneously asserted, by the legislature. Stip. Ex. 38 (§ 5 submission of Chapter 7). This resulted primarily of course from their general locations, in the "rural" Coastal Plain and the "urban" Piedmont Crescent respectively, but it undoubtedly was heightened in degree by the planners adherence to the 20,000 population convention, one of the very factors that indisputably contributed to their irregular shapes.

That they are distinctively "rural" and distinctively "urban" in character is a fact so much within the common knowledge of intelligent inhabitants of the state that it probably is subject to judicial notice. *McCormick on Evidence*, (4th ed. 1992), at § 329.

But if it be needed, there is ample evidence to demonstrate the fact. We summarize its core.

The First District is wholly within a predominantly agricultural region. Of the state's four counties that have agriculture as their principal source of income, all are in the First District. The counties included in whole or in part within the District had 64% of the state's harvested cropland in 1992. Stuart Rpt. p. 23. Five of the top ten tobacco-producing counties in the state, seven of the top ten sweet potato-producing counties, all of the top ten peanut-producing counties, seven of the top ten in hog production, eight of the top ten in cotton production, eight of the top ten in farm cash receipts, and seven of the top ten in corn for grain production are partly or wholly within the First District. Stip. 123. The district is without question predominantly rural in character.

Correspondingly, the Twelfth District is wholly within a predominantly urban, industrialized area of the state -- the most heavily industrialized of its regions. Of its citizens, 86.3% reside in urban areas as defined by the Census Bureau. D. Ex. 401, p. 35, table 19. This measure of urbanness applies to African-American and white residents alike: at least two-thirds of the districts white residents and three-fourths of its African-American residents live in urban areas as so defined. Lichtman testimony, Tr. pp. 791-93; D. Ex. 440. The Twelfth District is without question predominantly urban in character.

Reflecting their distinctive rural and urban natures, the more important fact for our purposes is that the two districts, as intended by the legislature, have correspondingly different and distinctive communities of interest. And, even more important, there are within each of the districts substantial, relatively high degrees of homogeneity of shared socio-economic -- hence political -- interests and needs among its citizens. Belying any intuitive assumption that the very bi-racial make-up and the irregularity of shape and geographical non-compactness of these districts would reflect great diversity and conflicts of interest among their citizens, both anecdotal and expert opinion evidence demonstrates the contrary. Inhabitants of both districts, drawing on their specific life experiences in the areas, are able to bear witness to the homogeneity

of the material conditions and interests of the citizens of each; respected scholars of the regions concur. Stuart Rpt. pp. 23, 25, 29 (First District); Goldfield Rpt. p. 2 (Twelfth District); Institute for Research in Social Science, Univ. of No, Car., Stip. Ex. 49, pp. 1, 2 (Twelfth District); D-I Wit. Sts. Nos. 2 (Alvarez), at pp. 2-5; 3 (Albright); 4 (Rash) at pp. 4-8; 9 (Davis), at pp. 4-5; 12 (Burts) at pp. 4-5; 25 (Emerson) at pp. 25-26 (Lambeth); 27 (McGovern).

These individual observations are validated on a larger scale by expert opinion concerning the homogeneity of basic interests in each of the districts. Based upon reliable analyses using accepted political-social science methodology, the two districts are among the most, rather than the least, homogeneous of the current twelve, in terms of the material conditions and political opinions of their citizens, whether only its white citizens, or only its African-American, or both together are considered. D. Ex. 401, pp. 11-25, Tables 3, 4, and 8.[9]

This distinctiveness of shared interests as between the two districts, and the homogeneity of those interests within each, are not accidental occurrences. They directly resulted from the legislature's contemporaneously-expressed purpose, in designing a plan to comply with the Voting Rights Act, to observe as a guiding districting principle the desirability of having districts with significant communities of interest as well as the necessary remedial racial compositions. Their deliberate location in different regions of

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[illegible] This analysis was performed and reported by Dr. Allan Lichtman, the state's expert witness who testified at trial. Plaintiffs and plaintiff-intervenors objected to large portions of his testimony and the exhibits used to illustrate it, on the ground that his analysis of the distinctive homogeneities of the two districts was largely based on 1990 census data that was not available to the legislature during the redistricting process. For this reason, it was contended, this data, hence Lichtman's analysis in reliance upon it, was irrelevant to any issue of legislative intent in constructing these districts. We disagree. As with the objective evidence of the continued existence of the farmland Chapter conditions, see supra n.36, this evidence was relevant to validate the legislature's more intuitive and experiential perception -- contemporaneously expressed -- that the districts would indeed have just such high degrees of commonalities of interest -- of homogeneity. Had there been contrary evidence -- that they did not -- its relevance to demonstrate the pretextual nature of the state's asserted purpose in constructing them as we would have been obvious. There was none.

the state having well and long-established historical integrities and distinctive cultures and economies insured that they would be such districts. Goldfield Rpt. pp. 1011, 15.

There is no convincing evidence in the record that the irregularities and lack of geographical compactness of these two districts have had or are having any significant adverse effect upon their citizens' interests in fair and effective representation -- in matters either of voting or access to their elected representatives. Indeed, such evidence as there is on the matter preponderates in the other direction.

Plaintiffs point to evidence of extremely low (6%) name recognition of Twelfth District Representative Watt in a postelection sample survey of his constituents. O'Rourke testimony, Tr. p. 232. One of the plaintiffs, a Duke University Law Professor testified that though he was not confused as to his residence within the Twelfth District by its odd shape, a Duke History Professor neighbor of his reported being so. Shimm testimony, Tr. pp. 1086-87. A High Point businessman reported being surprised to find when he went to vote, that he was in the Twelfth District. Froelich Aff. p. 2. Beyond this, there was only opinion evidence that as a general proposition geographical non-compactness tends to make both campaigning, voting, and effective representation more difficult, O'Rourke testimony, Tr. pp. 209, 232, and some anecdotal evidence of instances of supposed inattentiveness of the two recently elected representatives to particular events or localities in their districts. *E.g.* Shimm testimony, Tr. pp. 1090-92.

On the other hand, voter participation in the 1992 congressional elections in North Carolina -- with its quite recently created, peculiarly-shaped, non-compact districts -- was higher than the national average that year. It was also higher than that in any neighboring state -- all of which had relatively more compact congressional districts overall. And it was higher than that in the 1988 congressional elections in North Carolina, when the state's districts overall were more geographically compact. Lichtman testimony, Tr. pp. 819-22; D. Ex. 440, pp. 61, 62, 64, Tables 40, 41, 42. Nor did the irregularities resulting from the splitting of some counties between two or even three congressional districts

have any demonstrable negative effect on voter participation in the 1992 congressional elections. In fact, according to data assembled by plaintiff-intervenors' own expert, Dr. O'Rourke, of the ten counties in the state where voter "roll-off" between the 1992 presidential and congressional elections was greatest, six were not divided, and of the ten where there was either no roll-off or even greater participation in the congressional elections, six were divided into two districts and one into three. O'Rourke testimony, Tr. pp. 263-66.

Though the parties offered some evidence, largely anecdotal, about the extent to which the districts' configurations might affect the degree of accessibility to and responsiveness of the two districts' representatives,[59] we think it too meager -- given their short terms in office -- to support any fair finding of fact on the subject. The few physical facts of the districts' configurations in relation to transportation facilities, media markets, commuting patterns and volumes certainly do not support any finding that their irregularities of shape necessarily will make their representatives less accessible and responsive than those of other districts.[60]

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[59] A completely separate matter, unrelated to the effect of the remedial districts' shapes upon the accessibility and responsiveness of their representatives to *all* their constituents, is the question whether, without regard to their shapes, the very remedial purpose of the districts necessarily inhibits the ability of any African-American representatives elected from them to provide fair and effective representation to non-minority constituents. This obviously is an important political question for Congress concerning the remedial provisions of the Voting Rights Act, but it is irrelevant to any legal issue in this case turning on the peculiar shapes of these districts. We mention it only to indicate why we discount as legally irrelevant the opposing evidence on the subject offered by the parties: for the plaintiffs, Professor Shimm's opinion that the very remedial purpose of the districts necessarily prevented fair and effective representation by African-Americans of non-minority constituents such as he, Shimm testimony Tr. p. 1090; for the defendants, that in fact, the two current representatives had been called upon and had responded more frequently during their terms to requests for services and expressions of views by white than African-American constituents. Lichtman Report, p. 66, Table 43.

[60] That objective evidence should reveal -- perhaps counterintuitively -- that the extreme "ugliness" of these districts has little if any effect of itself on fair and effective representation is unsurprising once a moment's honest reflection is put to it. Their perceived "ugliness" -- their extreme irregularity of shape -- is entirely a function of an artificial perspective unrelated to the common goings

Aside from their irregularities of shape and lack of geographical compactness, their urban and rural natures, and the resulting homogeneity of interests within them, the districts have two other characteristics of relevance to the legal issues.

First, they are generally located in areas of the state where violations of the Voting Rights Act have occurred. All or portions of 22 of the First District's 27 counties are covered by § 5 of the Voting Rights Act. Stip. 109. In the *Gingles* litigation in the mid-1980s, § 2 violations were found in 11 of these counties. Since *Gingles*, 21 counties and cities within the District have been subject to § 2 actions which resulted in changes from at-large local election systems. Keech Dep., Tables 8A and 8B. Two of the ten counties included in part in the Twelfth District, Gaston and Guilford, are covered by § 5. Stip. 110. In the *Gingles* litigation, § 2 violations were found in both of these counties. Since *Gingles*, a number of § 2 actions have resulted in changes to local election systems in four of the Twelfth District's counties: Guilford, Forsyth, Davidson, and Iredell. Keech Dep., Tables 8A and 8B.

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and comings of the citizen-voter. From the mapmaker's wholly imaginary vertical perspective at 1:25,000 or so range, a citizen may well find his district's one-dimensional, featureless shape aesthetically "bizarre," "grotesque," or "ugly." But back down at ground or eye-level, viewing things from his normal closely-bounded horizontal perspective, the irregularity of outline or exact volume of the district in which he resides surely is not a matter of any great practical consequence to his conduct as citizen-voter. In the earth-bound, horizontal workaday world of his political and other lives, it surely never occurs to him -- until aroused to dislike something else about his district or his representative -- that the lines that include him with others in a particular electoral district wander irregularly rather than evenly to enclose them. What happens is that after every re-drawing of the lines of any of the various overlapping electoral districts in which he resides, he learns quickly enough (if interested enough), either by official notice or unofficially, that he is now in the same or a new district that is identified by a number. He has no idea where exactly on the earth's surface the lines of the district -- mostly invisible from this live perspective -- run throughout their course. Nor does he need to know in order to conduct his political affairs effectively as a citizen of the district. In due course he learns that candidates A and B are contending for his vote, learns what he wants to about them, re-learns where his present voting location is, casts his vote, and thereafter has whatever contact he wants with his representative, completely unaffected either by where exactly his district boundaries lie, his lack of exact knowledge of their location, or by any "ugliness" that may from the mapmaker's perspective result from their irregular shape.

Second, the two districts have but narrow African-American voting majorities: in the First District, 50.5% of the registered voters; in the Twelfth District, 53.5% of the registered voters. Though African-American candidates were elected to represent both districts in the first elections held under the Plan, it is demonstrably the case in North Carolina that such narrow voting majorities do not assure election of minority candidates. Of the eight majority-minority House and Senate districts created to comply with § 2 of the Voting Rights Act pursuant to the judgment in *Gingles*, three are presently represented by whites elected to office despite the minority-race voting majorities in those districts.

C. Summary of Ultimate Facts Found

1. In enacting the challenged congressional redistricting plan, the General Assembly of North Carolina deliberately created two districts, the First and the Twelfth, that would have narrow, but effective voting majorities of African-American citizens, specifically intending thereby to give the African-American citizens of those districts a reasonable opportunity to elect representatives of their choice.

2. The General Assembly did this in order to comply with §§ 2 and 5 of the Voting rights Act, on the basis of the well-founded belief of a sufficient majority of its membership that failure to do so would, or might well, violate one or both of those provisions.

3. Though there was some sentiment in the General Assembly that doing so was warranted simply as remedy for the state's long and continuing history of race-discrimination in matters of voting, that sentiment was not sufficient in voting power to have caused the legislative action independent of the perceived compulsion of the Voting Rights Act.

4. The two districts are highly irregular in their shapes and extreme in their lack of geographical compactness as compared to other districts in the plan or to other districts nationally. They are not the two most geographically

compact majority-minority districts that could have been created were no factors other than equal population requirements and effective minority-race voting majorities taken into account.

5. The exact locations and highly irregular shapes of the two districts result from a combination of factors that influenced legislative choices: the equal-population requirements in relation to the population dispersions in the areas of their locations; the need for effective African-American voting majorities; the legislative intention to create one predominantly rural (First) and one predominantly urban (Twelfth) district, and, concomitantly, two districts with distinctive and internally homogeneous commonalities of interest; incumbent protection; and the maintenance of technical territorial contiguity. After the equal population and majority-minority imperatives, the most important factor for the legislature was the creation of districts with distinctive and internally homogeneous communities of interest. In according primacy to these redistricting principles, the legislature necessarily had to subordinate geographical compactness and respect for the integrity of political subdivisions, and did so.

6. The irregularities of shape and lack of geographical compactness of the two districts have not demonstrably affected adversely the fair and effective representation of their citizens. The present representatives, both African-Americans, are able effectively to maintain their accessibility to constituents by the standard devices of the integrity of mailings, local offices, and personal visits to their districts.

IV.

Conclusions of Law

1. This three-judge district court has jurisdiction under 28 U.S.C. §§ 1331, 1343, and 2284.

2. The substantive nature of the Equal Protection claim remanded to this court by the Supreme Court is as defined and discussed in Part II-A of this Opinion. *See supra* at 14-20.

3. The plaintiffs and their supporting intervenors have standing to maintain the Equal Protection claim remanded to this court by the Supreme Court, because they have established that they are registered to vote in North Carolina's congressional elections and that the challenged redistricting plan assigns them to vote in particular electoral districts at least in part because of their race. *See supra* at 20-30.

4. The state defendants' concession that, in designing the challenged congressional redistricting plan, the General Assembly of North Carolina deliberately drew two districts -- the First and the Twelfth -- so that African-American citizens had a voting majority in each, established *prima facie* that the Plan was a "racial gerrymander" that violated the Equal Protection Clause. *See supra* at 30-47. This had the effect of subjecting the Plan to judicial strict scrutiny to determine whether its use of race could yet be justified as a "narrowly tailored" means of furthering a "compelling state interest." *Id.*

5. In this strict scrutiny inquiry, the initial burden has been upon the state to come forward with evidence that the Plan's use of race was so justified. *See supra* at 51-54. But the burden of persuasion has remained throughout upon the plaintiffs to prove the Plan unconstitutional, and that burden extends to disproving any justification adequately advanced by the state. *Id.*

6. As explained more fully in Conclusions of Law 7 and 8 below, the state has produced sufficient evidence that the challenged Plan's use of race is narrowly tailored to further one or more compelling state interests to carry its burden of production under strict scrutiny analysis.

7. The state has adequately established that it had a "compelling interest" in enacting a race-based congressional redistricting plan, by demonstrating that it had a "strong basis in evidence" for concluding that such action was necessary to bring its existing congressional redistricting scheme into compliance with §§ 2 and 5 of the Voting Rights Act. *See supra* at 54-69.

The General Assembly had a "strong basis in evidence" for concluding that enactment of a race-based redistricting plan was necessary to avoid a violation of § 2 of the Act, because it was aware from a variety of sources -- including earlier legislative experience with § 2 challenges to redistricting plans, legal advice, and general personal knowledge -- that African-American voters could very likely make out a *prima facie* § 2 challenge to its original Chapter 601 plan, or any other plan that did not contain two majority-minority districts, *see supra* at 119-24, and that the state could not defend a § 2 challenge to such a plan by arguing that it nonetheless provided African-Americans with equal political and electoral opportunity because it gave them a majority in a number of congressional districts that was roughly proportional to their share of the state's voting-age population as a whole. *See supra* at 123. *Compare DeGrandy*, ___ U.S. at ___, 62 U.S.L.W. at 4760-62.

The General Assembly also had a "strong basis in evidence" for concluding that enactment of a race-based congressional redistricting plan was necessary to comply with § 5 of the Act, because the Justice Department had denied preclearance to its original Chapter 601 plan on the ground that it failed to satisfy the "purpose" prong of § 5, and the state reasonably concluded, after conducting its

own independent reassessment of the Chapter 601 plan in light of the concerns identified by the Justice Department, that the Justice Department's conclusion was legally and factually supportable. *See supra* at 125. *Compare Hays I*, 839 F. Supp. at 1196 & n. 21 (Justice Department had not denied § 5 preclearance to earlier version of same congressional redistricting plan).

That the General Assembly did not make specific legislative findings that the Chapter 601 plan would violate the Voting Rights Act is of no consequence, *see Wygant*, 476 U.S. at 277-78 (plurality); *id.* at 289-91 (O'Connor, J., concurring), for it is clear from the record as a whole that the General Assembly was in fact "attempting to remedy its own unlawful conduct," rather than "to alleviate the wrongs suffered through general societal discrimination," *id.* at 289, when it enacted Chapter 7, and that it "act[ed] on the basis of information which g[ave] [it] a sufficient basis for concluding that [such] remedial action [was] necessary." *Id.* at 291. *Compare Croson*, 488 U.S. at 498-506 (majority) (state failed to demonstrate a compelling interest in engaging in race-based remedial action where it could not show that it was attempting to remedy identified instances of past or present discrimination within its own jurisdiction, but only general societal discrimination in the country as a whole). That the state initially took the position, when enacting the Chapter 601 plan and seeking its preclearance, that the plan would not violate the Voting Rights Act, does not mean that it did not have a "substantial basis" for concluding that the plan would violate the Voting Rights Act when it later decided to abandon that plan and enact the Chapter 7 plan in its stead, and that its assertions to that effect must be dismissed as nothing but "weak post-hoc rationalizations." *Post*, at 180. The record as a whole firmly establishes that while the state may have believed in good faith that the Chapter 601 plan would not violate the Voting Rights Act when it first enacted and sought preclearance for that plan, it later reassessed that belief in light of the objections raised by the Justice Department in its denial of preclearance, and concluded -- with

considerable justification -- that it may well have been erroneous.

8. The state has adequately established that the Plan creating the two remedial districts was "narrowly tailored" to serve the compelling interests discussed above. First, the state has demonstrated that the Plan does not create more majority-minority districts than is reasonably necessary to comply with the Voting Rights Act, and that the African-American voting majorities in each of those districts (50.5% and 53.5%, respectively) are no greater than is reasonably necessary to give African-Americans a reasonable opportunity to elect representatives of their choice in them. *See supra* at 74-76. *Compare Hays I*, 839 F. Supp. at 1207-08 (race-based redistricting plan not "narrowly tailored" where it "packed" minority voters into majority-minority districts in percentages much greater than reasonably necessary to give them a fair opportunity to elect representatives of their choice in those districts). Second, the state has demonstrated that the Plan does not impose a rigid quota for African-American representation in North Carolina's Congressional delegation, but only a flexible goal, *see supra* at 76-78, and that that goal (2 out of 12 seats, or 16.7%) bears a reasonable relation to the percentage of African-American voters in the state's population as a whole (22%), *see supra* at 80-81. Third, the state has demonstrated that the Plan is a remedial measure of limited duration, which will automatically expire at the end of the ten-year redistricting cycle, and thus will last no longer than is reasonably necessary to eliminate the effects of the particular discrimination it is designed to redress. *See supra* at 78-80. Finally, the state has demonstrated that the Plan does not impose an undue burden on the rights of innocent third parties (such as plaintiffs in this case), because it complies with constitutional "one person, one vote" requirements, does not unconstitutionally dilute the voting strength of any identifiable group of voters, and creates districts which, though highly irregular in shape and relatively non-compact geographically, are nonetheless based on rational districting

principles that ensure fair and effective representation to all citizens covered by them, since they are deliberately designed to be and are in fact highly homogeneous in terms of their citizens' material conditions and interests, and do not significantly inhibit access to and responsiveness of their elected representatives. *See supra* at 81-102.

9. The plaintiffs have not carried their burden of proving that the justification the state has advanced for the challenged Plan's use of race is untenable, either because the interest identified was not a "compelling" one or because the means used were not "narrowly tailored" to its achievement. Their only challenges to the two bases of justification advanced have been legal ones which are without merit, as is necessarily implied in our conclusions of law 7 and 8.

10. The challenged congressional redistricting plan does not violate any rights of the plaintiffs or their supporting intervenors under the Equal Protection Clause. Judgment accordingly will be entered for the state defendants dismissing this action on the merits.

V.

Conclusion

The question in the end is whether a deliberately race-based districting plan enacted by an overwhelmingly white legislature in one of the former Confederate states in order to comply with its understanding of the commands of national law enacted to enforce the guarantees of the Fourteenth and Fifteenth Amendments shall be declared unconstitutional at the behest of five white voters whose voting rights have been in no legally cognizable way harmed by the plan. We have concluded that under controlling law and the material facts of this case, the legislation passes strict scrutiny as a sufficiently narrowly tailored effort by the state legislature to serve the state's compelling interest in complying with that national remedial law.

Pointing essentially to the odd shapes of the two districts resulting in part -- though by no means entirely -- from the legislature's racial design, the plaintiffs, through counsel, have characterized the plan as a "constitutional crime." We have concluded instead that, under controlling law, it is a justifiable invocation of a concededly drastic, historically conditioned remedy in order to continue the laborious struggle to break free of a legacy of official discrimination and racial bloc voting in North Carolina's electoral processes that has played a significant part in the ability of any African-American citizen of North Carolina, despite repeated responsible efforts, to be elected to Congress in a century. We decline in this case to put a halt to the effort by declaring the plan unconstitutional.

VOORHEES, Chief District Judge, concurring in part, and dissenting in part:

I concur in the majority's findings here that the Plaintiffs have sufficient standing to bring suit under the Equal Protection Clause of the Fourteenth Amendment, and further that Plaintiffs have successfully carried their burden of showing a racial gerrymander, for which the State of North Carolina must now offer compelling justification. I also concur in the majority's finding that Plaintiffs retain the ultimate burden of persuasion throughout these proceedings. However, I register my dissent as to the balance of the majority's opinion.

I.

Nature of the Constitutional Wrong

I agree that the evidence presented at trial wholly supports the finding here of a racial gerrymander, and that as such North Carolina's redistricting plan must survive strict scrutiny before it can be said to pass constitutional muster. Indeed, one glance at the map suffices to demonstrate to even the most casual observer the existence of at the very least a suspect intent on the part of the North Carolina General Assembly, a suspect intent that in itself demands explanation and justification.[1] But I would go one step further than the majority in assessing the significance of the shapes of the districts currently before us, consistent with my reading of the Supreme Court's opinion in *Shaw* v. *Reno*.

The majority's opinion explicitly limits the relevance of the districts' odd shapes to circumstantial evidence of the State's alleged discriminatory intent. *See ante* at 38-40, 86. Where the legislature has conceded such an unlawful intent, as its witnesses have explicitly done here, the majority would dismiss any evidence of

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[1] Justice Souter remarks in his dissent in *Shaw* that "[t]he shape of the district at issue in this case is indeed so bizarre that few other examples are ever likely to carry the unequivocal implication of impermissible use of race that the Court finds here." *Shaw* v. *Reno*, ___ U.S. ___, ___, 113 S. Ct. 2816, 2848 (1993) (Souter, J., dissenting).

district shape as essentially duplicative.[2] This approach, however, ignores the special breed of harms recently recognized by the Supreme Court in *Shaw*, a breed of harms "analytically distinct" from any associated with the mere intent to discriminate. *Shaw*, U.S. at , 113 S. Ct. at 2830 ("Nothing in [*United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977)] precludes white voters (or voters of any other race) from bringing the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification"). The Court in *Shaw* characterized those harms explicitly as follows:

> Put differently, we believe that reapportionment is one area in which *appearances do matter*. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the *perception* that members of the same racial group -- regardless of their age, education, economic status, or the community in which they live -- think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes. By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.
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> The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate

[2] Likewise, Justice Stevens argues in dissent that "[e]vidence of the district's shape is therefore convincing, but it is also cumulative, and, for our purposes, irrelevant." *Shaw*, ___ U.S. at ___, 113 S. Ct. at 2844 (Stevens, J., dissenting).

> the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.
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> * * *
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> Justice Souter apparently believes that racial gerrymandering is harmless unless it dilutes a racial group's voting strength. As we have explained, however, reapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race *injures voters in other ways*. It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole. Justice Souter does not adequately explain why these harms are not cognizable under the Fourteenth Amendment.
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> * * *
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> Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters -- a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.

Id. at ___, 113 S. Ct. at 2827-32 (citations omitted) (emphasis added). In short, race-based districting creates racially conscious districts and foments racial polarization within them.

As observed by Justice White in his dissent in *Shaw*, "[t]he logic of [the majority's] theory appears to be that race-conscious redistricting that 'segregates' by drawing odd-shaped lines is qualitatively different from race-conscious redistricting that affects groups in some other way." *Id.* at ___, 113 S. Ct. at 2838 (White, J., dissenting). Indeed, Justice White's observation is consistent with my reading of *Shaw* v. *Reno* as well. The majority here, however, fails even to acknowledge this significant distinction, instead implicitly subscribing to Justice White's argument that "[t]he consideration of race in 'segregation' cases is no different than in other race-conscious districting . . . . A plan that 'segregates' being functionally indistinguishable from any of the other varieties of gerrymandering, we should be consistent in what we require from a claimant: Proof of discriminatory purpose and effect." *Id.* at ___, 113 S. Ct. at 2840-41.[3] Of course, this assumes first that a plan that "segregates" is, *a priori*, functionally indistinguishable from a more compact redistricting plan, an assumption that ignores the special breed of harms recognized by the Supreme Court, and second that the only cognizable "effects" under the Equal Protection Clause therefore are vote dilution and obstruction of voter access. *See id.* at ___, 113 S. Ct. at 2836 (White, J., dissenting) (equal protection violation "only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively"). That *Shaw* requires the State to justify not only its concededly discriminatory intent but also its scheme of implementation as a matter of constitutional relevance should not be surprising but expected in light of the divisive role that race has played in American society to date.[4]

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[3] Hence the majority's observation that the Equal Protection claim here "is, in effect, the same basic claim that the Court has recognized in other contexts in which race-based remedial measures, or 'affirmative action,' undertaken by state actors have been challenged, typically by members of the majority race claiming 'reverse discrimination.'" *See ante* at 19. However, the majority disregards the fact that it was the shapes of North Carolina's congressional districts that prompted the instant litigation in the first place, and that it was likewise district shape, as a manifestation of legislative intent, that gave the Supreme Court considerable cause for concern on appeal. Nonetheless, the majority's opinion inexplicably renders district shape irrelevant altogether under the facts of this case. For the reasons discussed here, I would find that the Equal Protection claim recognized by the Court in Shaw is substantively distinguishable from more familiar "reverse discrimination" claims.

Not long ago, in *Davis* v. *Bandemer*, 478 U.S. 109 (1986), a plurality of the Supreme Court observed that "the valid or invalid configuration of the [politically gerrymandered] districts was an issue we did not need to consider," *id.* at 142, since the Court expressly determined that "aside from election results, none of the facts found by the district court were relevant to the question of discriminatory effects." *Id.* at 142 n. 20 (opinion by White, J.). Significantly, the Court in *Shaw* found that at least in the context of racial gerrymanders the configuration of districts is indeed relevant to the question of "discriminatory effects." In that regard, it seems clear from the cited language in *Shaw*, and from notions of logic and common sense, that a racially gerrymandered district of the tortuous nature presented here inflicts a harm qualitatively distinct from that imposed by an intentionally created majority-minority district whose contours are geographically compact and contiguous, a harm that the Supreme Court has found to be cognizable under the Fourteenth Amendment. The constitutional injury here, then, derives not only from the nature of the State's ultimate objective -- namely, to classify citizens on the basis of their race -- but also from the means employed to achieve that objective -- namely, voting districts so grossly misshapen as necessarily to divide and stigmatize their citizenry along racial lines. As the legislature must go to greater and greater lengths of disfigurement to achieve a racially preconceived result because of the dispersion of minority voters among the population, the districts at last become so bizarre in shape that they can only be perceived as racially designated districts.[5] At this point, the harm has achieved a constitutional dimension and the shapes of the districts an unconstitutional one.[6]

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[4] The majority's reliance on discriminatory intent alone cannot be reconciled with the Supreme Court's express reservation of the question of whether the deliberate creation of majority-minority districts, without more, always triggers strict scrutiny. *See Shaw*, ___ U.S. at ___, 113 S. Ct. at 2828 ("we express no view as to whether 'the intentional creation of majority-minority districts, without more,' always gives rise to an equal protection claim").

[5] Indeed, the testimony of District 12's congressional representative, Mel Watt, speaks for itself. *See, e.g.*, Tr. pp. 999-1001 ("representing a district that you are consistent with in your philosophies allows you to be consistent in voting your conscience *without buckling under* or *catering*, as you said my statement said, to other interests that may not predominate in my district [such as the 'business or *white community*']") (emphasis added).

In order to prevail the State should therefore be required to offer a compelling justification for the means employed as well as the ends served. The evidence adduced simply does not support a finding of such justification. Put another way, I would find the districts created here to be inherently defective, by characterization not sufficiently "narrowly tailored" to survive strict scrutiny. To dismiss the relevance of district shape from our inquiry otherwise is to ignore the Supreme Court's mandate in this particular case.[7]

II.

Lack of Justification

The primary justification proffered by the State for its redistricting plan, on which the majority here entirely relies, is its statutory duty to comply with the Voting Rights Act.[8] The State

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[6] The majority's opinion cites a host of legislative concerns, including incumbent protection, equal-population requirements, and district homogeneity, that affected the specific contours of the districts at issue here. *See ante* at 146-47. That such concerns played a role in the redistricting process is indisputable. Equally indisputable, however, is the fact that race, and race alone, was the *sine qua non* not only for the need for majority-minority districts generally, but also for the need to draw district lines of such peculiar shape, a fact of which the majority too easily loses sight.

[7] Curiously enough, the majority's opinion seems to recognize the significance of "stigmatic" harm in its discussion on standing. *See ante* at 20-30 ("In other contexts, the Supreme Court has recognized that a state's use of racial classifications necessarily inflicts 'stigmatic' injury, which, though 'abstract' in the sense that it cannot easily be quantified, is sufficient 'injury in fact' to give any citizen who has been 'personally denied equal treatment' by such a classification standing to challenge it under the Equal Protection Clause") (citations omitted). Why the significance of such stigmatic harm is not recognized by the majority in the present context is puzzling, although not altogether surprising given the majority opinion's feverish concluding characterization of the case before us. *See ante* at 154 ("The question in the end is whether a deliberately race-based districting plan enacted by an overwhelmingly white legislature in one of the former Confederate states in order to comply with its understanding of the commands of national law enacted to enforce the guarantees of the Fourteenth and Fifteenth Amendments shall be declared unconstitutional at the behest of five white voters whose voting rights have been in no legally cognizable way harmed by the plan").

[8] The majority contends that the redistricting plan enacted by North Carolina here is most closely analogous to a "voluntarily" adopted affirmative action plan

argues that it had a duty to comply both with § 2 and with § 5 of the Act, thereby necessitating at least two majority-minority districts, if not these two majority-minority districts in particular. Keeping in mind the crucial distinction between compact and non-compact majority-minority districts and the implications thereof as recognized in *Shaw*, I will address each of the State's arguments, and the majority's disposition thereof, in turn.

A. Compliance With Section 2 of the Voting Rights Act

The State first asserts that it had a compelling interest in complying with § 2 of the Voting Rights Act, and that failure to create the districts at issue might very well have resulted in liability thereunder. Essentially the State argues that it had a duty to anticipate a potential violation of the Voting Rights Act and to remedy such a violation in a timely fashion. As the Supreme Court has recognized, "[t]he States certainly have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and as applied." *Shaw*, ___ U.S. at ___, 113 S. Ct. at 2830. In order to rely on such an interest, however, the State must at the very least demonstrate that "it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been [some violation of the Voting Rights Act]." *Wygant* v. *Jackson Bd. of Education*, 476 U.S. 267, 277 (1986)(plurality opinion) (regarding remedial action for prior discrimination). In other words, the trial court must make a factual determination that the State "had a strong basis in evidence for its conclusion that remedial action was necessary." *Id.*

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for purposes of analysis under the Equal Protection clause, and as such may require less scrutiny than a "judicially-imposed" plan. *See ante* at 48 n. 21. If, as the majority maintains, the State alternatively faced liability under § 2 of the Voting Rights Act or denial of preclearance by the Department of Justice, I fail to see how its actions were "voluntary." The majority's opinion elsewhere characterizes the Voting Rights Act as an exercise of Congress' "constitutional mandate" pursuant to the Fourteenth and Fifteenth Amendments. *Ante* at 100. Accordingly, a state's obligation to comply with the Act would hardly seem elective. The distinction here between "voluntary" and "judicially-imposed" remedial plans on the facts of this case should therefore play no role in the legal analysis.

The Supreme Court in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), set out the threshold requirements for a vote dilution claim under § 2 of the Voting Rights Act. First, a minority group must be able to demonstrate that it is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 50 (footnote omitted). Second, the minority group must be able to show that it is "politically cohesive." *Id.* at 51. Third, the minority must be able to demonstrate that "the white majority votes sufficiently as a bloc to enable it ... to defeat the minority's preferred candidate." *Id.* (citation omitted). These being the threshold requirements for liability under § 2 for vote dilution, it follows that North Carolina must have had a "strong basis" in evidence for concluding that these three requirements had been met and that remedial action was therefore necessary.

It is significant to note as a preliminary matter that there is absolutely no evidence whatsoever in the legislative history of Chapter 7 regarding violations of the Voting Rights Act, or the necessity for any remedial action, other than as a response to the Attorney General's objections lodged against the State's initial redistricting proposal. Certainly no legislative findings were ever made during the redistricting process concerning the relevance of the factors set out in *Gingles*; on the contrary, in its submission to the Department of Justice in support of Chapter 601, its original redistricting plan, the State expressly disavowed the importance thereof altogether.[9] The majority here makes only conclusory

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[9] In support of the State's first redistricting proposal (Chapter 601), and in reply to certain comments filed by the American Civil Liberties Union (ACLU) arguing in favor of a second majority-minority district pursuant to *Gingles*, *supra*, Gerry Cohen, the Director of Legislative Drafting for the North Carolina General Assembly, submitted a memorandum dated October 14, 1991 (hereinafter the "Memorandum"), to the Department of Justice on behalf of House Redistricting Committee co-Chairman Toby Fitch, Senate Redistricting Committee Chairman Dennis Winner, and House Speaker Daniel T. Blue. In rejecting the ACLU's contentions regarding a second district, the State's Memorandum first noted that the findings in *Gingles* concerning North Carolina's racial disparities were ten years old and based on statistics dating back to 1978. Stip. Ex. 25 at 16. It asserted that "the gains [in black voter registration] that the three-judge court had said had not occurred by the time of the 1983 trial have now occurred." *Id.* At various points in the Memorandum, moreover, the State proclaimed "an end to any discrimination in voter

registration" and "an end to the kind of discriminatory history recited both [sic] in the Congressional history of the 1982 Amendments to the Voting Rights Act." *Id.* at 16-17, 70.

As for racial appeals in political campaigns, another consideration under *Gingles*, the State asserted that "aside from the racial appeals attributed to Jesse Helms in 1990, the ACLU shows no evidence of them in the past decade since *Gingles*." *Id.* at 17. The State further disputed the ACLU's allegations concerning continued polarized voting in North Carolina, pointing to recent black electoral successes in "Wake, Durham, Cumberland, Guilford, Forsyth, Orange, etc." counties, leading to a "dramatic" increase in the number of black elected officials between 1980 and 1990. *Id.* at 17, 19, 43, 65.

The State also rejected the contention that a second reasonably compact majority-minority district was feasible. In its Memorandum the State noted that "*Gingles* requires that a district be geographically compact in order to satisfy one of the prongs of the initial test." *Id.* at 34. Citing *Dillard* v. *Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1466 (M.D. Ala. 1988), the State argued that a district is not compact if it is so spread out or convoluted that there is no sense of community, or that its representatives and members could not efficiently stay in touch with each other or easily tell who lived in the district. *Id.* The State further asserted that a district is likewise not compact if it is "materially stranger in shape than some of the districts contained in the enacted plan." *Id.* at 35 (quoting *Jeffers* v. *Clinton*, 730 F. Supp. 196, 207 (E.D. Ark. 1989), *aff'd*, 498 U.S. 1019 (1991)).

The State therefore asserted that all of the ACLU's proposals for a second majority-minority district failed the "compactness tests" described in *Gingles*, *Dillard*, and *Jeffers*. *Id.* The State also claimed that the creation of an additional majority-minority district would require "stitch[ing] together dozens of disconnected black concentrations," and "snaking all over everywhere at the [census] block level." *Id.* at 33, 47. The State specifically criticized a second majority-minority district proposed by Republican House Member David Balmer as "meander[ing] over 200 miles"; "so sprawling that it was most often described as 'ludicrous' or 'absurd'"; and "too sprawling and uncompact to allow for effective campaigning and representation." Stip. Ex. 26. Further, the State claimed that in order to create such districts, it would be required to divide several more voting precincts, resulting in a "nightmare" of voter confusion and electoral complications. Stip. Ex. 25 at 31-32. The State's own observations now serve to describe North Carolina's current Chapter 7.

Given the State's efforts to disavow the continued relevance of *Gingles* and the nearly total absence of support in the legislative record, I disagree with the majority's conclusions that the General Assembly was "*without doubt aware*" or "*necessarily aware*" that "conditions in North Carolina were such that the African-American minority could likely prove many of the other factors that are relevant to establishing a § 2 violation," *see ante* at 119-22, and that there was a "*general perception* by the legislature (or at least its leadership) that the African-

observations about the General Assembly's "powerful, recent institutional and individual memories," *see ante* at 119, its "general perception" concerning potential liability under the Voting Rights Act, *ante* at 123, and the fact that it was "without doubt aware" or "necessarily aware" of the requisite circumstances thereunder. *See ante* at 119, 122. But the majority's opinion fails to cite where in the legislative record the General Assembly specifically considered its duties under the Voting Rights Act and the implications thereof for a proposed redistricting plan.[10] The State's contention that it was actually motivated by such concerns in light of the substantial evidence to the contrary has no support in the record whatsoever. Reversing its earlier contemporaneous position, the State now

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American minority could make out a prima facie § 2 case with respect to any congressional redistricting plan that did not include two majority-minority districts . . . ." *Ante* at 123 (emphasis added). One could safely conclude that legislators were "without doubt aware" of the "need" for virtually *any* act of legislation.

[10] Indeed, the portions of the legislative record cited in the majority's opinion support the conclusion that the Voting Rights Act was *not* the primary inspiration for Chapter 7:

> I'm not going to try to speak as a lawyer versed in congressional or any other kind of redistricting. Because I haven't even read the *Gingles* case and I don't know much about it.
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> • • •
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> And I'll say this, also, that I want the black people of this State of have [sic] two congressmen in the United States Congress. I think they *deserve* it.

Stip. Ex. 200 at 924 (excerpt of Senate floor debates) (emphasis added). Another Senator echoed this sentiment:

> So, I just want to say I support this bill because I think so far as the blacks are concerned that yes, they *deserve* two black districts. After going through a 1990 race, they can see we still need to make some improvements in how our relationships are between our people. So I say to you, let's see how this works.

Id. at 932 (emphasis added).

advances this argument as a matter of convenience to justify its unconstitutional behavior in enacting Chapter 7.

The majority holds that contemporaneous findings need not be made by a legislature prior to taking remedial action, *see ante* at 59-61, 150-51, a proposition with which I generally agree. But in holding contemporaneous legislative findings of past discrimination unnecessary, it is unlikely that the Supreme Court contemplated rendering them irrelevant altogether. Such a result would necessarily prompt the same concerns, albeit to a lesser degree, expressed by Justice O'Connor regarding a state's voluntary efforts to eradicate the effects of past discrimination:

> That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power, and the States must undertake any remedial efforts in accordance with that provision. To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions. The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1. We believe that such a result would be contrary to the intentions of the Framers of the Fourteenth Amendment, who desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations.

City of Richmond v. *J.A. Croson Co.*, 488 U.S. 469, 490-91 (1989) (opinion by O'Connor, J.) (citations omitted) (emphasis in original). *See also id.* at 510 ("Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes

or a form of racial politics"). While contemporaneous findings may not be required *per se*, certainly evidence to precisely the opposite effect would militate against a finding of compelling interest to justify the State's actions. At the very least such evidence raises serious concerns about the State's underlying motives here and the degree to which its interests can be genuinely characterized as "compelling," consequently casting doubt on the majority's conclusions in this regard.[11]

Of course, even assuming that the State's findings, such as they were, proved sufficient to warrant remedial action, and further assuming that the State has made sufficient showings of political cohesiveness and racial bloc voting under *Gingles* to support a finding of vote dilution under § 2 (showings not made here),[12] the evidence presented arguably supports the State's original contention

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[11] The majority also notes the political sparring that took place between North Carolina Republicans and Democrats over the location of the majority-minority districts and the specific contours thereof. To the extent that such decisions were motivated by political expediency on either party's part, I would find the State's interest in creating these particular districts that much less compelling. The fight here was about power. The Democratic majority party in the legislature, as the State admits by its answer, sought to protect its incumbents; the evidence also showed that it drew district lines to enhance its members within the State congressional delegation. The Republican Party legislators had like motives. This is simply not the stuff of which solemn rectifications of past racial wrongs are wrought.

[12] Regarding the *Gingles* requirement of political cohesion, I cite Justice Thomas' recent observations in *Holder* v. *Hall*:

> According to the rule adopted in *Gingles*, plaintiffs must show simply that members of a racial group tend to prefer the same candidates. There is no set standard defining how strong the correlation must be, and an inquiry into the cause for the correlation (to determine, for example, whether it might be the product of similar socioeconomic interests rather than some other factor related to race) is unnecessary . . . . As a result, *Gingles*' requirement of proof of political cohesiveness, as practically applied, has proved little different from a working assumption that racial groups can be conceived of largely as political interest groups.

___ U.S. ___, ___, 62 U.S.L.W. 4728, 4737 (June 30, 1994) (Thomas, J., concurring in the judgment) (citations omitted).

that the creation of a second "geographically compact" majority-minority district simply was not possible, given the "relatively dispersed" nature of the black population in North Carolina. *See Shaw*, ___ U.S. at ___, 113 S. Ct. at 2820 (noting that blacks constitute a majority of the general population in only five of the State's 100 counties). Indeed, the impracticality of creating a second geographically compact district is perhaps best demonstrated by the existence of District 12 itself.[13] Where there was no reasonable prospect of liability for vote dilution under § 2 given the dispersed nature of North Carolina's black population, therefore, and thus no "strong basis in evidence" supporting remedial action in connection therewith, the majority's finding in favor of a compelling interest in that regard is ill-taken.

Even if there were sufficient justification to create more than one majority-minority district generally in North Carolina, the very shape of District 12 demonstrates the absence of any compelling interest to create this particular gerrymandered district in order to avoid liability for vote dilution under *Gingles*, since the concept of geographical compactness was disregarded altogether. Put another way, had the district lines been drawn differently, would blacks living in various parts of what now constitutes District 12 have had a legitimate cause of action under § 2 because their votes had been fragmented or split, thereby diluting their potential voting strength? Clearly not. *See Gingles*, 478 U.S. at 50. If the purpose

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[13] In *Dillard*, *supra*, the District Court stated that "a district is sufficiently geographically compact if it allows for effective representation." 686 F. Supp. at 1466. Defendants cite this language in support of their contention that District 12 is in fact "geographically compact," common sense notwithstanding. But even *Dillard* recognized that "a district would not be sufficiently compact if it was so spread out . . . or if it was so convoluted that there was no sense of community . . . ." *Id.* The term "geographic" at least connotes physical location, and the word "community" implies some sense of physical proximity as well. Indeed, Webster's Dictionary defines "community" as most of us would, namely, "the people living in a particular place or region and usually linked by common interests." Webster's 3d New Int'l Dictionary. The Court in *Gingles* elsewhere summarized its holding as follows: "Stated succinctly, a bloc voting majority must usually be able to defeat candidates supported by a politically cohesive, *geographically insular* minority group." *Gingles*, 478 U.S. at 48-49 (emphasis added) (citations omitted). It is safe to say that the minority population extracted from virtually all over the State to comprise both District 1 and District 12 has never been characterized as "geographically insular."

behind the creation of Districts 1 and 12 was to empower a geographically compact, politically cohesive minority population, as the State maintains, then clearly the State failed miserably to attain that purpose, since neither district can be said to incorporate a geographically compact population of any race. To find otherwise would render the Court's vote dilution test in *Gingles* a nullity.

In this respect, the Supreme Court's distinction between "what the law permits, and what it requires" is particularly relevant. *Shaw*, ___ U.S. at ___, 113 S. Ct. at 2830. That the Voting Rights Act *permits* race-conscious districting in the form of majority-minority districts is clear from the plurality decision in *UJO. United Jewish Organizations*, 430 U.S. at 156-61 (opinion by White, J.). To find that the Voting Rights Act *requires* the creation of districts as tortured as those in question here, such that compliance with the Act suffices as a compelling state interest under equal protection analysis, defies logic and reason. The necessary implication of the majority's holding in this regard, that majority-minority districts may and should be created wherever technologically possible regardless of the geographic consequences thereof, is to impose on states a *de facto* requirement of proportional representation,[14] a result expressly prohibited by case

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[14] Indeed, the majority originally cited the recent Supreme Court case of *Johnson* v. *DeGrandy*, ___ U.S. ___, ___, 62 U.S.L.W. 4755, 4760-62 (June 30, 1994), specifically for the proposition that the State here had an obligation to create majority-minority districts "in substantial proportion" to African-Americans' share of the State's voting-age population. *See* Opinion filed August 1, 1994, at 144 (opinion by Phillips, J., joined by Britt, J.) ("The General Assembly had a 'strong basis in evidence' for concluding that enactment of a race-based congressional redistricting plan was necessary to avoid a violation of § 2 of the Act, because its members were aware from a variety of sources. . . that the Chapter 601 plan did not create districts in which African-Americans were a voting majority in substantial proportion to their share of the State's voting age population"). However, I read *DeGrandy* only for the more limited proposition that if a state's existing plan already features majority-minority districts in substantial proportion to a given minority's share of the states voting-age population, then the state generally has no further obligation to *maximize* the possible number of majority-minority districts located within its boundaries. *DeGrandy*, ___ U.S. at ___, 62 U.S.L.W. at 4761 ("reading § 2 to define dilution as any failure to maximize tends to obscure the very object of the statute and to run counter to its textually stated purpose . . . . Failure to maximize

law, *see, e.g.*, *Mobile* v. *Bolden*, 446 U.S. 55, 76 (1980) ("The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization"); *Freeman* v. *Pitts*, ___ U.S. ___, ___, 112 S. Ct. 1430, 1447 (1992) ("Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation"), and by the statutory provisions of § 2 of the Voting Rights Act itself. *See* 42 U.S.C. § 1973b ("Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population"); *see also Gingles*, 478 U.S. at 97 (O'Connor, J., concurring in the judgment) ("Requiring that every minority group that could possibly constitute a majority in a single-member district be assigned to such a district would approach a requirement of proportional representation as nearly as is possible within the framework of single-member districts. . . . This approach is inconsistent with the results test and with § 2's disclaimer of a right to proportional representation").[15]

Such a result is untenable and unconstitutional. Where a minority population is relatively dispersed geographically, as is the black population in most parts of North Carolina, and the only means therefore of achieving a majority-minority district is to disfigure the voting districts, the result amounts to a racial quota in pursuit of proportional representation.[16] Consequently, as in

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cannot be the measure of § 2"). The majority has since reconsidered its position. *See ante* at 149-50.

[15] The majority's contention that majority-minority districts that guarantee only the *opportunity* for minority electoral success do not violate § 2's rejection of proportional representation, *see ante* at 77-78, is wholly unpersuasive. As Justice Thomas notes in his concurrence in *Holder*, *supra*, "[i]t should be clear that a system that gives a minority group proportional control [accomplished even by a bare majority] effectively provides the 'right' to elect a proportionate number of minority candidates that the Act disclaims. Whether that right is utilized by minority voters to elect minority candidates is a matter of the voters' choice." ___ U.S. at ___, 62 U.S.L.W. at 4744 n.26.

[16] On December 17, 1991, House Speaker Daniel T. Blue, Jr., Representative Toby Fitch, Senator Dennis Winner, Leslie Winner, and Gerry Cohen travelled to Washington, D.C., to meet with John Dunne, the Assistant Attorney General of the United States for Civil Rights. The meeting had been called by Mr. Dunne in connection with the rejection of North Carolina's original redistricting

Wygant, *supra*, there is "no logical stopping point" to the majority's theory in this case. *Wygant*, 476 U.S. at 275 (plurality opinion) (finding that there was "no logical stopping point" to the District Court's role model theory, which allowed the Board of Education to engage in discriminatory hiring and layoff practices "long past the point required by any legitimate remedial purpose"); *see also Croson*, 488 U.S. at 498 ("'Relief' for such an ill-defined wrong could extend until the percentage of public contracts awarded to MBE's [minority business enterprises] in Richmond mirrored the percentage of minorities in the population as a whole"); *Davis*, 478 U.S. at 130-31 (plurality opinion) ("To draw district lines to maximize the representation of each major party would require creating as many safe seats for each party as the demographic and predicted political characteristics of the State would permit"). If North Carolina's District-12 were in fact *required* by the Voting Rights Act, as the majority seems to imply, then virtually any district, whatever shape or form, no matter how dispersed its

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plan (Chapter 601). Senator Winner recounted the events of the meeting in his deposition, waiving his legislative privilege:

> That meeting -- I could not figure out the purpose of that meeting once we got into it, because it was very obvious to me -- that was the first time I met John Dunne, or whatever his name is. And it was very obvious to me that Mr. Dunne had already made his mind up, and why he dragged us to Washington I don't know.
>
> They talked about the Senate and the House plan -- you know, out of an hour or two hour meeting maybe we spent five minutes on the legislative plans. Most of it had to do with the congressional plan. And Mr. Dunne did most of the talking--there was a little talking from the other staff, but he did most of the talking, and most of it got down to sort of that we ought to have a quota system with respect to minority seats. You had 22 percent blacks in this state. Therefore, you ought to have as close to that as you could have of congressional districts. That is really all I remember about it . . . . I think his substance was really that you had -- if you had 22 percent blacks in North Carolina, then you ought to have 22 percent minority congressional seats. Whatever shape didn't matter.

Deposition of Senator Dennis Winner at 17-19.

population, would be upheld. Furthermore, under the majority's theory here, every minority group that could make out the proper showings under *Gingles* would consequently be entitled to its own single member district, ultimately resulting in systematic political apartheid. *See Shaw*, ___ U.S. at ___, 113 S. Ct. at 2827. To the extent that the Voting Rights Act by some stretch of the imagination does require such districts, therefore, I would find the Voting Rights Act to be unconstitutional, especially as applied in light of the distinct harms identified by the Court in *Shaw*.

In the alternative, even assuming that the State could have made a proper showing as to *all* of the relevant factors under *Gingles*, thereby supporting a finding of liability under § 2, and, further, that contemporaneous findings to that effect by the General Assembly are not required to support the State's burden herein (or, more precisely, that the State's actual beliefs to the contrary do not preclude a finding to that effect now), it only seems logical that whatever "remedy" the State imposes in anticipation thereof must be adequately tailored to the "wrong" to which it is addressed. *See also City of Rome* v. *United States*, 446 U.S. 156, 213 (1980) (Rehnquist, J., dissenting) ("These precedents are carefully formulated around a historic tenet of the law that in order to invoke a remedy, there must be a wrong"). That is, even if compliance with § 2 constitutes a sufficient compelling interest for the creation of majority-minority districts generally, certainly the degree to which the State's proffered remedy -- specifically the creation of Districts 1 and 12 -- in fact addresses the anticipated violation here is at least relevant to whether the plan is "narrowly tailored." To hold otherwise would effectively read the "geographical compactness" requirement out of the Court's § 2 jurisprudence altogether, since a gerrymandered district conceivably could *always* be drawn to incorporate enough black voters to constitute a majority in a single-member district, no matter how dispersed they were throughout the State. Surely this was not the Court's intention in *Gingles* when it made compact geography at least legally relevant in vote dilution cases, if not required.[17] The relevance of district

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[17] As a three-judge panel in Maryland recently noted, political scientists and voting law scholars have proved that *any* group of voters -- regardless of where they live -- can be fit into one contiguous district. *Marylanders for Fair Representation, Inc.* v. *Schaefer*, 849 F. Supp. 1022, 1052 n.38 (1994) ("If every

shape to the issue of whether North Carolina's redistricting plan is narrowly tailored will be discussed more fully *infra*.

I would make one final general observation here before moving on with the analysis. By its plain language, the Voting Rights Act protects nothing more, and certainly nothing less, than the "opportunity" to participate in the political process and indeed specifically disavows any guarantee of proportional representation. Section 2(b) of the Act provides that:

> A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less *opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered. . . .

42 U.S.C. § 1973b (emphasis added).

Since there are no allegations here that blacks in North Carolina are currently prevented from participating *per se* in the political process, from registering and exercising their right to vote, then the only salient evidence presented by the Defendants and Defendant-Intervenors here regarding a violation of § 2 would seem to be the extent to which members of the black population have

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every name in the Manhattan phone book is randomly associated with one of ten districts, a map can be constructed that will place every voter in a literally contiguous district no matter which combination of names and districts are chosen. The resulting redistricting map would certainly look odd – in places, districts might be stretched thin as telephone wires – but it can be done, regardless of where the voters live"). The panel went on to conclude, rightly so, that "[o]n this view, Justice Brennan's requirement in *Gingles* that a minority group be compact enough to be placed in a contiguous remedial district would actually be no requirement at all." *Id.*

been able to elect representatives of their choice or at least had the opportunity to do so. If we are to assume that the candidates of choice for blacks in North Carolina have always been black themselves, as Defendants imply, then we would have to find that the opportunity to elect such candidates has been denied them, given the congressional election results over the course of North Carolina's political history. *See also Gingles*, 478 U.S. at 93 (O'Connor, J., concurring in the judgment) ("electoral success has now emerged, under the Court's standard, as the linchpin of vote dilution claims").

But in assessing vote dilution, it is not at all clear why the Court should not take into account political *influence* as well -- after all, "the power to influence the political process is not limited to winning elections." *Davis*, 478 U.S. at 132 (plurality opinion); *see also Gingles*, 478 U.S. at 94-100 (O'Connor, J., concurring in the judgment) (otherwise "the Court's test for measuring voting strength and its test for vote dilution, operating in tandem, come closer to an absolute requirement of proportional representation than Congress intended when it codified the results test in § 2"). Moreover, § 2 expressly states that electoral success is only one circumstance which may be considered in vote dilution claims, leaving the door open to other kinds of evidence.[18] Of course, there was no evidence presented to this Court regarding political influence *per se*, and the Court therefore has no basis on which to make a determination with respect thereto. But certainly such evidence, admitted for that limited purpose rather than as a testament to historical discrimination generally, would have been relevant to the question of the State's potential liability under § 2. For the courts to ignore such evidence, properly presented, is to limit unnecessarily the intended reach of the Voting Rights Act, thereby prompting legitimate concerns about proportional representation.

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[18] The Supreme Court has expressly left open the question of whether influence-dilution claims are themselves cognizable under § 2. *Growe* v. *Emison*, ___ U.S. ___, ___, 113 S. Ct. 1075, 1084 n.5 (1993); *see also Gingles*, 478 U.S. at 46-47 n. 12; *Voinovich* v. *Quilter*, ___ U.S. ___, ___, 113 S. Ct. 1149, 1155 (1993).

In sum, then, I dissent from the majority's finding here that, under the circumstances presented, North Carolina had a compelling interest in complying with § 2 of the Voting Rights Act. The State lacked a sufficient basis in evidence reasonably to anticipate liability under § 2, and the remedial legislation allegedly enacted in response thereto, Chapter 7, was consequently unwarranted. Plaintiffs have therefore met their ultimate burden of persuasion. Moreover, the fact that the General Assembly failed to make explicit findings as to its remedial intent, and now brings before the Court only weak post-hoc rationalizations, precludes finding in favor of the Defendants on this issue. Finally, even if remedial action had been warranted, the threshold requirement in *Gingles* of geographical compactness must at least have implications for whether North Carolina's redistricting plan can ultimately be described as "narrowly tailored," an issue which I discuss in more detail *infra*.

B. Compliance With Section 5 of the Voting Rights Act

North Carolina's next argument in support of its redistricting plan derives from its statutory duty to comply with § 5 of the Voting Rights Act. More specifically, the majority here finds that the State had a compelling interest to comply with the Attorney General's preclearance requirements under § 5 by demonstrating that its revised plan (Chapter 7) had neither the "purpose . . . [nor] the effect of denying or abridging the right to vote on account of race or color. . . . " 42 U.S.C § 1973c; *see also* 28 C.F.R. § 52.52.[19] As the majority observes, there are two separate prongs to the § 5 standard, but I, like the majority, find the "effect" prong inapplicable in the case presently before us. As to the "purpose" prong of the § 5 standard, I agree that an analysis thereunder essentially duplicates the analysis under the constitutional vote dilution standard, namely requiring a showing that the proposed redistricting plan was not designed to dilute minority voting strength. *See ante* at 66 n. 31. This is essentially the identical argument offered by the State in connection with its alleged duty to

[19] In fact, North Carolina's original plan (Chapter 601) was explicitly rejected by the Attorney General for failure to demonstrate as much. *See ante* at 115-16 (quoting Stip. 72, Stip. Ex. 27).

comply with § 2, discussed *supra*; the only material difference, of course, is that the State's interest here in complying with § 5 stems not from a desire to avoid future liability under the Voting Rights Act but from an administrative goal to secure preclearance from the Attorney General.[20] Especially in light of the Attorney General's rejection of North Carolina's original plan, the State argues that it consequently had a compelling interest to comply with its obligations under § 5 as interpreted and enforced by the Attorney General in connection with its submission of Chapter 7.

Blind deference to the administrative findings of the United States Attorney General cannot render the State's conduct here immune from constitutional scrutiny, however. Since the General Assembly had the option of subsequently seeking preclearance in the United States District Court for the District of Columbia, *see* 42 U.S.C. § 1973c, and expressly considered such a course of action, its choice not to do so but instead to capitulate to the Attorney General's recommendations effectively negates the argument that the creation of Chapter 7 in its present form was required per se under § 5. In other words, reliance on the Attorney General's interpretation and application of the Voting Rights Act, without regard to the accuracy or constitutionality thereof, is insufficient in itself to constitute a compelling state interest. Instead, there should be some independent basis for the State's apprehension of vote

[20] The majority observes in a footnote that coverage under § 5 "is tantamount to a congressional finding that the jurisdiction in question has committed identified violations of the Fifteenth Amendment in the relatively recent past," *see ante* at 68 n.33, and that such a finding may be regarded as "sufficient, in and of itself, to give that jurisdiction a 'strong basis in evidence' for thinking that it must engage in race-based redistricting . . . ." *Id.* Given the restrictive nature of the Voting Rights Act's bailout provisions, however, such a rule, taken to its logical conclusion, could conceivably require a jurisdiction to employ increasingly extreme race-based remedial devices over a prolonged period of time without any real justification. This could not have been Congress' intent when it enacted the Voting Rights Act. Moreover, evidence was adduced at trial that some members of the legislatur e believed that Justice Department officials were acting with partisan motives in requiring the State to create two majority-minority districts. This climate of opinion tends to contradict any contention that the legislature sincerely believed that "it must engage in race-based redistricting" in order to remedy voting rights violations.

dilution sufficient to justify remedial action to correct it.[21] Otherwise the majority's holding in this respect would vest the Department of Justice with unbridled and unprecedented discretion, since under these circumstances at least the Department of Justice's findings would be deemed conclusive, and the Attorney General would further enjoy a *de facto* ability to determine the constitutional scope of federal legislation, heretofore a responsibility reserved for the courts.[22] For obvious reasons this is an altogether wholly unacceptable result.

In my opinion, then, the analysis here is subsumed within the analysis described above for vote dilution under § 2. Therefore, I would find that, at least in the case as it comes before us, the State should demonstrate that it had some independent basis for its apprehension that its initial redistricting plan was designed to dilute minority voting strength in an unconstitutional manner, thereby

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[21] I agree with the majority here that a state is not *required* to "challenge a Justice Department denial of preclearance in the United States District Court for the District of Columbia, and lose, before it may safely conclude that it has a compelling interest in adopting a new plan to address the concerns upon which the Department's denial of preclearance was based." *See ante* at 67. But to require a state to assert some *independent* basis for its apprehension of liability would neither manifest "disrespect for the judgment of the Attorney General" nor interfere with states' efforts "to comply voluntarily with their obligations under the federal civil rights laws." *Id.* at 67-68 (citations omitted). Indeed, such a requirement would only bolster a state's willingness to take remedial action, if warranted.

Here, of course, the State chose not to enact the particular district plan proposed by the Department of Justice, which included a majority-minority district in the south-central to southeastern part of the state. While the State obviously was not required to adopt the Department of Justice's proposal, its failure to do so or even to address the Department of Justice's concerns certainly casts some doubts on the merits of the Attorney General's objections and the compelling nature of the State's interest in complying therewith.

[22] The majority notes that Congress expressly authorized the Department of Justice to act as a "surrogate" for the United States District Court for the District of Columbia in approving redistricting legislation. *See ante* at 68. Such approval of course does not render redistricting legislation immune from subsequent judicial scrutiny, including invalidation. Section 5 of the Voting Rights Act itself specifies that neither a declaratory judgment in the United States District Court for the District of Columbia nor a ruling by the Attorney General shall bar a subsequent action to enjoin enforcement of a proposed change in voting procedure. *See* 42 U.S.C. § 1973c.

requiring it to take appropriate remedial measures in response thereto.[23] The State may indeed have had an independently compelling reason to create a second majority-minority district, if in fact the failure to do so would have amounted to vote dilution. Whether the failure to create any majority-minority districts or these districts in particular would have amounted to vote dilution again depends upon the State's potential liability under § 2 of the Voting Rights Act, as discussed *supra*. For the reasons stated above, again I would find either that the State could not have had a reasonable apprehension of liability under § 2, given the dispersed nature of the black population in North Carolina, or that, in the alternative, if the black population was in fact geographically compact enough to support liability under § 2, that such compactness must at least have implications for the shapes of the districts consequently created to remedy the § 2 violation in order to be "narrowly tailored."

Finally, it is interesting to note that of North Carolina's 100 counties, only 40 of those were subject to § 5's preclearance requirements at the time Chapter 7 was enacted. Any redistricting plan that affected all or a portion of these 40 counties would of course require preclearance, and such plans must by necessity be considered as a whole, not on a district-by-district basis. Obviously, if only one county in North Carolina were subject to the requirements of § 5, however, compliance therewith would not constitute a compelling interest for the creation of a gerrymandered district located elsewhere in the State. Here, of the 40 counties covered by § 5, none is entirely included within the Twelfth District, and only two such counties -- Gaston and Guilford -- are even partially included in District 12. Stip. Paras. 108-11.[24] To

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[23] Otherwise, the case before us presents the perfect example of how, in Abigail Thernstrom's view, § 5 has been improperly transformed from its original objective of "guarding against renewed disfranchisement, the use of the back door once the front was blocked," to an instrument to "promote the election of blacks to public office." *See* Abigail Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* 20, 38 (1987).

[24] Of the remaining 60 counties which are not covered by § 5, eight of those are included in part in District 12. In addition, eight of North Carolina's § 5 covered counties are entirely included within the First District, along with portions of 14

argue that the State therefore had a compelling interest to create these particular gerrymandered districts in order to comply with § 5's preclearance requirements defies common sense and would seem to defeat the purposes served by the Voting Rights Act. Insofar as the majority finds to the contrary, I dissent.

C. Remedy Past Discrimination

The final justification offered by the State for its racially gerrymandered districts is its interest in eradicating the effects of past racial discrimination. A state's voluntary efforts to remedy discrete and particular instances of discrimination is indeed a laudable endeavor and should not be discouraged. *See Wygant*, 476 U.S. at 289-91 (O'Connor, J., concurring in part and concurring in the judgment). Of course, a general showing of societal discrimination alone is not sufficient to justify a racial classification, *see id.* at 274-75 (opinion by Powell, J.), and the State must have had a "strong basis in evidence for its conclusion that remedial action was necessary." *Id.* at 277. I concur in the majority's finding here that the State has failed to demonstrate any basis in evidence for a conclusion that such remedial action was necessary, especially since the State has clearly demonstrated that it would not have enacted Chapter 7 *but for* the Attorney General's rejection of Chapter 601.[25]

However, where Congress has sought to implement a legislative remedial scheme as decidedly broad and far-reaching as the Voting Rights Act, I question whether, as the majority here holds, a state can be found to maintain a compelling interest to exceed this federal mandate in efforts to achieve racial equality. *See*

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other counties. Six of the remaining uncovered counties are included, in whole or in part, in the First District. Sixteen of North Carolina's 40 covered counties are not included, in whole or in part, in either of Chapter 7's majority-minority districts. *Id.*

[25] The majority's finding in this regard is of interest, however, in light of its prior conclusion that the General Assembly found sufficient reason to remedy a suspected § 2 violation, since contemporaneous evidence of legislative findings as to either justification is unquestionably scarce.

ante at 69-72. As the Court in *Shaw* clearly recognized, "only three Justices in *UJO* were prepared to say that States have a significant interest in minimizing the consequences of racial bloc voting apart from the requirements of the Voting Act." *Shaw*, ___ U.S. at ___, 113 S. Ct. at 2832. Significantly, as the Court further observed, "those three Justices specifically concluded that race-based districting, as a response to racially polarized voting, is constitutionally permissible only when the State 'employ[s] sound districting principles [such as compactness and population equality],' only when the affected racial group's 'residential patterns afford the opportunity of creating districts in which they will be in the majority.'" *Id.* at ___, 113 S. Ct. at 2832 (quoting *United Jewish Organizations*, 430 U.S. at 168 (opinion by White, J.)). Given North Carolina's total disregard for certain "sound districting principles," such as compactness and contiguity, I am compelled to find that the State's alleged efforts here to eradicate the effects of past discrimination transcend that which is expressly required by the Voting Rights Act.

The rationale behind the Court's apparent skepticism in *Shaw* in this regard should be obvious. It is by now a fundamental tenet in our equal protection jurisprudence that any effort by a state to remedy past discrimination must be carefully tailored, gauged to the specific past harm being alleviated. *Croson*, 488 U.S. at 507-08 (majority opinion); *Wygant*, 476 U.S. at 274 (plurality opinion). Where the past harm is as undefined as it is here, described in relatively abstract terms of vote "dilution" rather than outright "denial," however, there is the very real danger that the remedy imposed may actually become part of the problem, especially in light of the distinctive harms associated with racially gerrymandered districts generally. *See Shaw*, ___ U.S. at ___, 113 S. Ct. at 2827-32; *see also Croson*, 488 U.S. at 493 (opinion by O'Connor, J.) ("Classifications based on race carry a danger of stigmatic harm"); *Regents of University of California* v. *Bakke*, 438 U.S. 265, 298 (1978) (opinion by Powell, J.) ("preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor bearing no relationship to individual worth"). Accordingly, given the pitfalls necessarily inherent in any voluntary remedial undertaking concerning minority voting practices, I would find that

the State has no compelling interest to address past discrimination in voting practices beyond that required by the Voting Rights Act, the federal remedy mandated by Congress.

III.

Not Narrowly Tailored

Assuming that the district lines employed by the State of North Carolina here are not *inherently* unconstitutional, and further assuming that the State had a compelling interest for its otherwise unconstitutional conduct, the next question is whether the redistricting plan at issue here is narrowly tailored to further that interest. I find that the districts here, while keenly tailored, are by no means "narrowly tailored" as that term is employed in Equal Protection law.

To what extent North Carolina's redistricting plan is narrowly tailored of course depends upon what compelling interest is advanced to justify the plan. After all, "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Wygant*, 476 U.S. at 280 (plurality opinion) (quoting *Fullilove* v. *Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)). The majority again inexplicably claims that district shape is irrelevant beyond its significance as an indication of discriminatory intent, thereby unwarrantedly delimiting the scope of the Court's opinion in *Shaw*. *See ante* at 86. But while such traditional districting principles as compactness and contiguity may not be "constitutionally required" *per se*, *see Shaw*, ___ U.S. at ___, 113 S. Ct. at 2827, they are plainly relevant at least in a relative sense in assessing whether there were less restrictive means available to the General Assembly during the redistricting process. *See Bridgeport Coalition for Fair Representation* v. *City of Bridgeport*, 1994 WL 247075 at *8 (2d Cir. 1994) ("A purported remedy for perceived violations of Section 2 of the Voting Rights Act must include consideration of both racial fairness and traditional districting principles"); *Marylanders for Fair Representation*, 849 F. Supp. at 1053 ("although a State can -- and at times must -- place great weight on race when redistricting, it may not do so to the exclusion of all traditional, nonracial

districting principles, leaving a district that rationally can be understood only as 'an effort to classify and separate votes by race'") (citing *Shaw*, ___ U.S. at ___, 113 S. Ct. at 2828).

North Carolina's alleged interests in complying with §§ 2 and 5 of the Voting Rights Act are essentially based on the assumption that, but for the creation of these gerrymandered districts, the State would have been subject to a § 2 vote dilution claim or would not have been able to secure preclearance from the Attorney General under § 5. The first question the Court must ask, then, is to what extent the State's proposed "remedy" here, namely the enactment of Chapter 7, successfully addresses the anticipated underlying "injury," namely minority vote dilution. *United States* v. *Paradise*, 480 U.S. 149, 171 (1987) (opinion by Brennan, J.) (Court must consider "the necessity for the relief and the efficacy of alternative remedies"). The Court in *Paradise* undertook a similar endeavor in order to assess whether the remedy imposed in that case was narrowly tailored:

> To evaluate the District Court's determination that it was *necessary* to order the promotion of eight whites and eight blacks to the rank of corporal at the time of the motion to enforce, we must examine the purposes the order was intended to serve.

Id. (emphasis in original). Likewise, we must evaluate the State's asserted purposes here in order to determine whether the districts at issue are *necessary* in connection therewith.

As discussed *supra*, one of the threshold requirements of a § 2 vote dilution claim, and hence necessarily a factor in the Attorney General's § 5 preclearance considerations, is that the minority population at issue must be "geographically compact." *See Gingles*, 478 U.S. at 50. The logical implication of the Court's opinion in *Gingles*, and of the Congressional mandate expressed in § 2, is that if a politically cohesive and geographically compact minority population in fact exists, the State then has some obligation to incorporate said population in a majority-minority district in order to avoid liability under the Voting Rights Act. *Growe*, ___ U.S. at ___, 113 S. Ct. at 1084. Assuming *arguendo*

that there is a sufficiently "geographically compact" minority population in North Carolina to sustain a § 2 vote dilution claim, and thus a compelling reason for the State to take appropriate remedial measures in connection therewith in order to avoid liability and to secure preclearance under the Voting Rights Act, it would be difficult if not impossible to argue that the State here successfully incorporated compact minority populations within the boundaries of its two majority-minority districts. Indeed, one need only glance at the map to confirm that District 12 fails to accommodate a compact population of any race. In this context the precise shapes of the districts are relevant because they provide a gauge for the State's remedial success -- and from the looks of Districts 1 and 12, the State failed miserably. When districts are as strung out as Districts 1 and 12, lacking all inherent integrity, they cease being districts at all, instead merely patching together islands of voters with only a legislative intent to group predetermined numbers of voters by race. Creation of such districts was by no means "necessary" in order to comply with the Voting Rights Act.[26]

The State argues that Plaintiffs' submission at trial of an alternative district plan with more geographically compact districts in itself demonstrates the State's potential liability under § 2, since geographically compact majority-minority districts were clearly possible. In what can only be described as a legal leap of faith, however, the State, with the majority's blessing, *see ante* at 98-99 n. 50, asserts that whatever districts it actually created to preempt liability under the Voting Rights Act need not reflect or incorporate

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[26] In assessing proposed gerrymandered districts far less egregious than those presently before us, a three-judge panel in Arkansas likewise found that bizarre district shape could very well betray the absence of any compact minority population sufficient to warrant § 2 liability under *Gingles*. Writing for the Court, Judge Arnold held that:

> The peculiar shape of [plaintiff's proposed districts] . . . is precisely due to the lack of the compact minority population required by *Gingles* . . . . The bottom line is that the black population in this area is simply too widely dispersed for us to hold that the Board [of Apportionment] has violated § 2 by refusing to draw the additional . . . districts which the plaintiffs have requested.

Jeffers, 847 F. Supp. at 662.

the specific compact minority populations which would allegedly trigger the § 2 violation. This line of contention is devoid of both logic and common sense and hardly merits this Court's attention, much less its endorsement. I must conclude that the State "went beyond what was reasonably necessary to avoid [vote dilution]" and that North Carolina's reapportionment plan consequently is not narrowly tailored to accomplish that goal. *See Shaw*, ___ U.S. at ___, 113 S. Ct. at 2831.

The majority here identifies five other factors relevant to determining whether the State's remedial scheme is sufficiently tailored to survive strict scrutiny. With respect to the first factor, I agree with the majority that a state that has a compelling interest in complying with the Voting Rights Act obviously has no completely race-neutral means of accomplishing that goal. Equally obvious, however, is the fact that the North Carolina General Assembly here failed to utilize more conventional district shapes that, if not inherently "race neutral," at least would have been more likely to have been perceived as such by the voters. After all, "reapportionment is one area in which appearances do matter." *Id.* at ___, 113 S. Ct. at 2827. Again, where it is clear that a grossly disfigured majority-minority district poses dangers qualitatively distinct from those posed by a compact majority-minority district, the extent to which a redistricting plan *reflects* the use of race should have a significant bearing on our analysis. The very purpose of narrow tailoring, of course, is to promote the accomplishment of the remedy at *minimum* expense to other important interests, including contiguity and compactness. Where, as here, the State completely disregards less offensive alternatives in favor of a redistricting plan as contorted as the one presently before us, I find it difficult to characterize such a plan as "narrowly tailored." *See Croson*, 488 U.S. at 507 ("there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting").

With respect to the second factor, the majority here finds North Carolina's redistricting plan more analogous to a "flexible goal" than a "strict quota." *See ante* at 76-78. While the "remedial" device employed by the State here is distinguishable from more traditional numerical quotas, Chapter 7 in many ways

resembles the strict quota device struck down in *Croson, supra.* A redistricting plan that gerrymanders a given population in order to achieve a certain electoral result is closely analogous to hiring or promotion quotas designed to achieve a certain racial profile in the work force.[27] Given the absence of any "logical stopping point" for the creation of majority-minority districts pursuant to the majority's reading of the Voting Rights Act here, these districts "cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." *Croson*, 488 U.S. at 507. As discussed *supra*, however, proportional representation is clearly not a legitimate objective, either for legislative pursuit or for judicial encouragement. *Cf. Paradise*, 480 U.S. at 178 (opinion by Brennan, J.) ("The one-for-one requirement evaporated at the ranks of corporal and sergeant upon implementation of promotion procedures without an adverse impact, demonstrating that it is *not* a disguised means to achieve racial balance") (emphasis added). And just as courts have struck down extreme quota devices that bear no rational relationship to any goal other than outright racial balancing, *see, e.g., Croson*, 488 U.S. at 507, so too should we strike down extreme gerrymanders that promote nothing short of proportional representation.

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[27] The majority here makes much of the fact that, given the bare majority of blacks in North Carolina's two majority-minority districts, these districts in no way "guarantee" the election of an African-American to Congress in the same way that traditional quotas "guarantee" the hiring or promotion of certain minorities. *See ante* at 77-78. Whether or not the election of blacks in these districts is certain, however, it is undisputed that these districts were intended by the General Assembly to achieve a certain result -- guaranteeing blacks an *opportunity* to elect a representative of their own choice. This guaranty, of course, depends for its success on the legislative assumption that black voters will tend to vote in a bloc for black candidates. So while proportional representation may not always be the *actual* outcome of every election given the bare minority majorities in the districts at issue, it was nevertheless the *intended* outcome here, as the evidence strongly suggests.

In any event, the majority's argument that the Voting Rights Act requires even such "opportunity" districts arguably violates § 2's repudiation of proportional representation where North Carolina's redistricting plan effectively provides the "right" to elect a proportionate number of minority candidates, even if such right is not actually exercised by minority voters. *See Holder*, ___U.S. at ___, 62 U.S.L.W. at 4744 n. 26 (Thomas, J., concurring in the judgment); *see also supra* at 174 n. 15.

The majority's analysis of the final factor, the impact of the enacted districts on the rights of third parties, likewise gives cause for concern. *See Paradise*, 480 U.S. at 171 (opinion by Brennan, J.); *Fullilove*, 448 U.S. at 514 (Powell, J., concurring). Given the unique breed of harms caused by these racially gerrymandered districts as identified so forcefully in the Supreme Court's opinion in *Shaw*, harms suffered by racially gerrymandered district residents and non-gerrymandered district residents alike, I simply cannot subscribe to the view that such districts are "narrowly tailored" where in fact more compact alternative districts were feasible.

Here, the burden is not placed on innocent non-minorities (in terms of any denial of privileges, benefits, etc.) so much as it is placed on the very minorities that these districts were presumably created to empower. *See Croson*, 488 U.S. at 516-17 (Stevens, J., concurring in part and concurring in the judgment); *cf. Wygant*, 476 U.S. at 283-84 (plurality opinion). The stigma associated with such districts is real and tangible and cognizable under the Fourteenth Amendment per the Court's opinion in *Shaw*, ___ U.S. at ___, 113 S. Ct. at 2828, and even per the majority's opinion here. *See ante* at 20-30. *See also Fullilove*, 448 U.S. at 545 and n. 17 (Stevens, J., dissenting); *Croson*, 488 U.S. at 493 ("Classifications based on race carry a danger of stigmatic harm"); *id.* at 516-17 (Stevens, J., concurring in part and concurring in the judgment); *Bakke*, 438 U.S. at 298 (opinion by Powell, J.); *cf. Metro Broadcasting Inc.* v. *F.C.C.*, 497 U.S. 547, 601 (1990) (Stevens, J., concurring). Also, the stigmatic burden here is on *all* minorities, not just on certain nonminorities. *Cf. Metro Broadcasting*, 497 U.S. at 596-97. Given the Supreme Court's obvious concern for district shape as expressed in *Shaw*, the burden of these district shapes cannot be dismissed as "relatively light" or "diffuse," as the majority's opinion here so easily does. *Id.* at 600 (citing *Fullilove*, 448 U.S. at 484 (opinion by Burger, C.J.)). Rather, I would find that North Carolina's racially gerrymandered districts continue to "impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's racial preference." *Wygant*, 476 U.S. at 287 (O'Connor, J., concurring in part and concurring in the judgment). As evidenced by the alternative redistricting plans submitted by Plaintiffs at trial, there were "less intrusive" means available to the General

Assembly. *See id.* at 283. To characterize the burden to third parties here as "marginal unfairness," as the majority does, *see ante* at 82, is to ignore the clear implications of the Supreme Court's opinion in *Shaw*.[28] Accordingly, this Court's decision should recognize the significance to third-party voters and citizens of the Supreme Court's observations that "[b]y perpetuating such notions [of racial stereotypes], a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract," *Shaw*, ___ U.S. at ___, 113 S. Ct. at 2827, and that "elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy." *Id.* at ___, 113 S. Ct. at 2827.

Moreover, the majority's opinion, without justification, arbitrarily limits the criteria for evaluating North Carolina's redistricting plan to "constitutionally-mandated" redistricting principles, rendering all other considerations *de minimis*. *See ante* at 83-84. But it is not at all clear why redistricting principles which are not constitutionally-*mandated per se* should not be at least relevant and even significant in assessing a plan's constitutionality, especially where the constitutional relevance of such redistricting principles as compactness and contiguity has so recently been declared by the Supreme Court.[29] If we as a Court are to give any force at all to the mandate issued by the Supreme Court in this case, as I believe we must, then we must find in light of the cited language in *Shaw* that these districts are not "the most exact

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[28] That characterization also betrays the majority's belief that a legislature may, at its leisure, subordinate the constitutionally protected third-party interests identified in *Shaw* in favor of such a relatively transitory interest as incumbency protection, one of the admittedly primary goals of Chapter 7. *See generally* testimony of Gerry Cohen Tr. pp. 281-652.

[29] Indeed, if consideration were reserved solely for constitutionally-mandated redistricting principles, there would be no need to engage in a strict scrutiny analysis in the first place. If a voting district violated the "one person, one vote" standard or unduly diluted minority voting strength, such a district would be defective in its own right, inherently unconstitutional regardless of any compelling justification.

connection between justification and classification" as required in *Wygant*, *supra*. More compact variations were possible, and the State's redistricting plan is not sufficiently "narrowly tailored" to survive strict scrutiny.[30]

The majority also makes three arguments as to why, for practical reasons, courts should not consider notions of compactness and contiguity in assessing the constitutionality of voting districts. First, the majority asserts that such traditional districting principles have "little inherent value" in the districting process since they are no longer necessary to ensure fair and effective representation. *See ante* at 89. The majority's conclusion in this regard, however, is misplaced. The evidence at trial amply demonstrated that the combination of modern computer technology and voter-specific census data, readily available today and used by the legislature in creating Chapter 7, permits the creation of districts of unreasonable length and complexity. *See generally* testimony of Gerry Cohen, Tr. pp. 281-652. Indeed, notwithstanding the potentially self-serving testimonies of those congresspersons elected to represent Districts 1 and 12, it cannot be gainsaid that 160 miles is long for such a lanky district as District 12; indeed, it is sufficiently long to be served by no less than three national airports and three television markets. District 1 is equally ungainly, spread-

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[30] The majority observes that "[n]either the *UJO* plurality nor the *Shaw* majority indicates that compactness, contiguity, and respect for political subdivisions are the *only* districting principles which can be considered 'sound'. . . ." *See ante* at 88 n. 44 (emphasis in original) (citing *United Jewish Organizations*, 430 U.S. at 167-68 (opinion by White, J.) ("we think it . . . permissible for a State, employing sound districting principles *such as* compactness and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority." (emphasis added))). But I fail to see how this authorizes a state to completely *disregard* traditional redistricting principles such as compactness and contiguity without consequence. I would therefore vigorously disagree with the majority's conclusion that "[i]n according primacy to these redistricting principles [including distinctive and internally homogenous communities of interest], the legislature *necessarily had* to subordinate geographical compactness and respect for the integrity of political subdivisions . . . ." *See ante* at 147 (emphasis added). The legislature was not *required* to subordinate geographical compactness, and it should therefore be held accountable for its choice to do so.

eagled over a vast portion of Eastern North Carolina, from Virginia to South Carolina. These facts make fair representation virtually impossible in Districts 1 and 12, a conclusion shared at one time by North Carolina's legislative representatives in marshalling support for Chapter 601. No less extreme would be a district that ran the length of the California coastline, some 800 miles in length -- indeed, the configurations of voting districts would be limited only by politicians' imaginations.[31] And while citizens of such districts would inevitably share certain concerns and interests, they would be denied the quality of representation inherent in a more geographically compact district, one that respected the established political, social, and economic communities already in existence.[32] So while it may be true, as the majority observes, that geography is no longer as important as it once was to the districting process because of improved transportation and communication, neither is it entirely irrelevant or insignificant.[33]

The majority's second and third arguments, regarding the absence of manageable judicial standards and the prospect of undue interference by the federal judiciary, respectively, are likewise unpersuasive.[34] Even under the majority opinion's narrow

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[31] *See also supra* at 177 n. 17.

[32] Of course, it is true that these values in isolation can be sacrificed by a legislature today with little fear of judicial intervention. But under *Shaw*, racial harmony is one value that may not be compromised free of strict (not scant) judicial scrutiny.

[33] The majority in my opinion drastically underestimates the degree of voter confusion that can result from gerrymandered voting districts and the significance of such confusion to the political process, while overlooking the significance of citizens' *perceptions* of fair and effective representation as well. A citizenry's perceptions of its political process can be as critical in a democracy as the process itself, and factors that can adversely affect such perceptions should not be dismissed. Thus, the majority's conclusion that certain facts outside the normal, "earth-bound, horizontal workaday world" of the citizen-voter, such as the irregularity of the district in which he or she resides, are not a matter of any great practical consequence, *see ante* at 143-44 n. 60, seriously underestimates the intellectual grasp of those voters. These people serve on juries in intricate cases, and they know when race is energizing the affairs of state.

interpretation of *Shaw*, determining whether or not a given district successfully *incorporates* a "geographically compact" minority population, and therefore sufficiently addresses any potential § 2 violation, regardless of the aesthetics thereof, is a decision which is appropriately within the purview of the federal courts and which is subject to a "relatively simple and judicially manageable" standard. *See Davis*, 478 U.S. at 149 (O'Connor, J., concurring in the judgment). And while concepts like compactness and contiguity may not be scientifically ascertainable, even the majority here concedes that certain of the districts before us could never be characterized as "compact" by any definition of that word. Indeed, the obvious difficulty in distinguishing between permissible hiring or promotional goals and impermissible quotas in other affirmative action contexts has never prevented courts from striking down remedies as irrational as the one presently before us. Where it is clear that the State has in fact crossed that line, it is unnecessary for us to decide, for the purposes of this case, at what point the State crossed it.

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[34] Regarding the political nature of the court's role in vote dilution cases generally, I find Justice Thomas' concurrence in *Holder*, *supra*, to have considerable merit. Justice Thomas, joined by Justice Scalia, notes that:

> by construing the [Voting Rights Act] to cover potentially dilutive electoral mechanisms, we have immersed the federal courts in a hopeless project of weighing questions of political theory.... [F]or it is only a resort to political theory that can enable a court to determine which electoral systems provide the "fairest" levels of representation or the most "effective" or "undiluted" votes to minorities.

___ U.S. at ___, 62 U.S.L.W. at 4733-34. Accordingly, "[t]he matters the Court has set out to resolve in vote dilution cases are questions of political philosophy, not questions of law. As such, they are not readily subjected to any judicially manageable standards that can guide courts in attempting to select between competing theories." *Id.* at ___, 62 U.S.L.W. at 4736 (footnote omitted). Determining issues of district compactness and shape no more involves courts in standardless policy-making than does each and every judicial endeavor under the Voting Rights Act. Indeed, the majority opinion's pejorative assessment of the inherent value of geographically-based voting districts generally, *see ante* at 8991, demonstrates the political nature of our endeavor here.

Although assessing the merits of future gerrymandering cases may prove to be difficult at times, that is not sufficient reason in itself to abdicate our responsibility to do so here. An assessment of "geographical compactness" can be no more problematic or standardless here than under the vote dilution test articulated by the Supreme Court in *Gingles*, *supra*, and in fact courts have already embarked on such endeavors since the Supreme Court's decision in *Shaw*. *See, e.g.*, *Marylanders for Fair Representation*, 849 F. Supp. at 1052-56 (finding that district at issue "is not only compact in its shape and appearance, but moreover reflects the reasonable balancing of numerous legitimate redistricting principles"). Indeed, the majority's opinion here successfully accounts for the stigmatic harms associated with gerrymandered districts in its analysis of standing, but it inexplicably fails to address such harms in weighing the ultimate constitutionality of Chapter 7. Thus, the majority would find that while residents of a racially gerrymandered voting district would always enjoy standing to bring suit, such standing would be of no avail so long as said district complied with certain "constitutionally-mandated" districting principles, regardless of its shape and the stigmatic harms associated therewith. The plain language of the Voting Rights Act and the Supreme Court's opinion in *Shaw* does not support such a reading.

I therefore reiterate my earlier observation in this case, *Shaw* v. *Barr*, 808 F. Supp. 461 (E.D.N.C. 1992), that it falls upon the courts to set forth constitutionally valid standards by which race-conscious redistricting may be implemented, and that it is not enough to leave these standards to the vicissitudes of "politics." *Id.* at 480-81 (Voorhees, C.J., dissenting). As the majority here recognizes, Congress has presumably balanced the need for "affirmative action" in the voting context against the potential harms thereof, resulting in the enactment and subsequent extension of the Voting Rights Act. But while it is true that every variety of "affirmative action" program necessarily relies on some offsetting form of the very discrimination such program is designed to combat, the remedial efforts undertaken here are particularly troublesome. *See Paradise*, 480 U.S. at 199 (O'Connor, J., dissenting) ("There is simply no justification for the use of racial preferences if the purpose of the [legislation] could be achieved without their use because '[r]acial classifications are simply too pernicious to permit

any but the most exact connection between justification and classification'" (quoting *Fullilove*, 448 U.S. at 537 (Stevens, J., dissenting))). As the Court in *Shaw* recognized, the essential thrust of the State's various arguments here is that "the deliberate creation of majority-minority districts is the most precise way -- indeed the only effective way -- to overcome the effects of racially polarized voting." *Shaw*, ___U.S. at ___, 113 S. Ct. at 2832. But I find it curious that the sole cure proposed for racially polarized voting and the effects thereof is a state-endorsed election system that is based on, and indeed whose success ultimately depends upon, racially polarized voting. *See ante* at 154 ("We have concluded instead that, under controlling law, [race-based districting] is a justifiable invocation of a concededly drastic, historically conditioned remedy in order to continue the laborious struggle to break free of a legacy of official discrimination and racial bloc voting").

It is often remarked that the vote is one of the most critical features of a representative democracy and therefore one of our most fundamental rights. *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964) (describing the right to exercise the franchise in a free and unimpaired manner as "preservative of other basic civil and political rights"). It is also true that, by definition, a racially gerrymandered congressional district is a highly visible feature of the political landscape, visible to the American public in a way that many remedial programs are not. Indeed, it is just this kind of visibility that concerned the Court in *Shaw* in the first place. It is crucial to remember also that racial classifications are by their very nature presumptively invalid. *City of Mobile* v. *Bolden*, 446 U.S. 55, 75-76 and n. 23 (1980); *see also Fullilove*, 448 U.S. at 523 (Stewart, J., dissenting) ("Under our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid"); *Paradise*, 480 U.S. at 193 (Stevens, J., concurring in the judgment) ("In such cases [not involving any proven violations of law] the governmental decisionmaker who would make race-conscious decisions must overcome a strong presumption against them"). Therefore, I recount with emphasis the Supreme Court's observation in *Shaw* that three Justices in *United Jewish Organizations* "specifically concluded that race-based districting, as a response to racially polarized voting, is constitutionally permissible *only* when the State

Nos. 94-923, 94-924

In the

Supreme Court of the United States

October Term, 1994

RUTH O. SHAW, *et al.*,
Appellants,

v.

JAMES B. HUNT, JR., *et al.*,
Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina Raleigh Division

MOTION TO AFFIRM BY APPELLEES, THE GOVERNOR AND OTHER OFFICIALS OF THE STATE OF NORTH CAROLINA

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Appellants are Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy Bullock, James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. Delapp, Jr., Richard S. Sahlie and Jack Hawke.

Appellees are James B. Hunt, Jr., in his official capacity as Governor of the State of North Carolina; Dennis A. Wicker in his official capacity as Lieutenant Governor of the State of the State of North Carolina, and President of the Senate; Daniel T. Blue, Jr., in his official capacity as Speaker of the North Carolina House of Representatives; Rufus L. Edmisten, in his official capacity as Secretary of the State of North Carolina; The North Carolina State Board of Elections, an official agency of the State of North Carolina; Edward J. High, in his official capacity as Chairman of the North Carolina State Board of Elections; Jean H. Nelson, in her official capacity as a member of the North Carolina State Board of Elections; Larry Leake, in his official capacity as a member of the North Carolina State Board of Elections; Dorothy Presser, in her official capacity as a member of the North Carolina State Board of Elections; June K. Youngblood, in her official capacity as a member of the North Carolina State Board of Elections; Ralph Gingles, Virginia Newell, George Simkins, N. A. Smith, Ron Leeper, Alfred Smallwood, Dr. Oscar Blanks, Reverend David Moore, Robert L. Davis, C. R. Ward, Jerry B. Adams, Jan Valder, Bernard Offerman, Jennifer McGovern, Charles Lambeth, Ellen Emerson, Lavonia Allison, George Knight, Leto Copeley, Woody Connette, Roberta Waddle, and William M. Hodges.

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Nos. 94-923, 94-924

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Appeal from the United States District Court for the Eastern District of North Carolina Raleigh Division

---

MOTION TO AFFIRM BY APPELLEES, THE GOVERNOR AND OTHER OFFICIALS OF THE STATE OF NORTH CAROLINA

Pursuant to Rule 18.6 of the Rules of the Supreme Court, appellees, the Governor and other officials of the State of North Carolina (hereinafter "State appellees"), move the Court to affirm the judgment of the three-judge United States District Court for the Eastern District of North Carolina on the grounds that, under the largely undisputed facts before the District Court, no substantial question arises that has not previously been decided by this Court or that would entitle appellants to the relief they seek, thus making further argument unnecessary.

STATEMENT OF THE CASE

The appeals in this congressional redistricting case challenge the efforts of the North Carolina General Assembly to meet the mandates of federal law and otherwise to provide fair and effective representation for all citizens in Congress without sacrificing other legitimate interests. This task -- by no means an easy one -- was met through legislative decisions to create congressional districts encompassing citizens, black and white alike, with shared economic, social and cultural interests, instead of focusing on drawing geographically compact districts that adhered to existing county and municipal boundaries. There is no significant factual dispute about these legislative decisions or the basis for them.

The process began in the spring of 1991 when the House and Senate redistricting committees met with citizens at a series of fifteen public hearings specifically to receive citizens' views about the criteria the General Assembly should use in the redistricting process and the ethnic, geographic, economic or other communities of interest it should consider. *Shaw v. Hunt*, 861 F. Supp. 408, 459-60 (E.D.N.C. 1994). Thereafter the redistricting committees jointly adopted written standards to guide them in the development of plans. Principal among these standards was compliance with the mandates of federal law, specifically one-person, one-vote requirements and anti-vote dilution requirements. Also included among these standards was creation of contiguous districts and adherence to the boundaries of existing precincts and census blocks to the extent practicable. Neither geographic compactness nor adherence to county and municipal boundaries, however, was adopted as standards. *Id.* at 418.

Acting on the belief that the Voting Rights Act required the creation of at least one majority-minority district, the redistricting

committees prepared several plans for consideration, each of which included one such district "centered on the large rural area of proportionately dense African-American population in the north-eastern part of the Coastal Plain, with an arm extending westwardly to include an African-American population in the inner city of Durham, on the eastern end of the 'Piedmont Urban Crescent,' and another arm extending southwardly into the center of the Coastal Plain." *Id.* at 460. Acting on a "freely conceded" motive to gain partisan advantage, Republican legislators advocated the adoption of alternative plans creating at least two majority-minority districts. *Id.* at 458, 462.

The Republican plan receiving the most attention would have created a second "majority-minority" district -- through the aggregation of African-American and Native American voters -- running from "downtown Charlotte at the western end of the Piedmont Urban Crescent southeastwardly approximately 200 miles through all or portions of a number of rural counties along the South Carolina border . . . across the Coastal Plain into downtown Wilmington on the coast." *Id.* at 461. Ultimately, the General Assembly adopted a plan "which included a single majority-minority district centered in the rural northeast and central portions of the Coastal Plain with the arm extending westward into the inner-city precincts of Durham." *Id.*

In accordance with Section 5 of the Voting Rights Act, this plan was submitted to the Department of Justice for preclearance. Opposition to the plan was voiced by "[t]he Republican leadership in the General Assembly and Republican Party officials at the State and national levels [who] actively urge[d] Justice Department officials to deny preclearance on the basis that the plan failed to include two majority-minority districts, which they believed to be required by the Voting Rights Act." *Id.* at 461. On December

18, 1991, the Attorney General refused to preclear the plan essentially on the grounds that failure to create a second majority-minority district accounting for African-American voters in the southern part of the state, as proposed by Republicans, appeared to be for "pretextual" reasons and to protect white incumbents. *Id.* at 462. A debate about challenging the Attorney General's decision in court ensued. For a number of legal, practical and political reasons, no challenge was filed. *Id.* at 462-463.

In January 1992, the General Assembly reconvened in Special Session to prepare new redistricting plans.[1] Ironically, a proposal initially made by Republican legislators to create a second majority-minority district in the Piedmont provided the framework for the plan ultimately adopted, and the vehicle by which the General Assembly would meet its redistricting goals. This plan, as modified and ultimately adopted, (1) enhanced the likelihood of compliance with Section 5 and the avoidance of liability under Section 2 by creating two bare-majority, majority-minority districts, the First District, located in the Coastal Plain, in which African-American citizens constituted 50.5 percent of the registered voters and the Twelfth District, located in the Piedmont Urban Crescent, in which African-American citizens constituted 53.5 percent of the registered voters; (2) avoided undue risk to the reelection of incumbents, Republican and Democrat alike, by preserving the cores of their previous districts; and (3) avoided sacrificing the interests of Democrats by constructing the second majority-minority district from predominately Republican areas rather than predominately Democratic areas.

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[1] The Department of Justice had also refused to preclear the General Assembly's plan for redistricting the State House and State Senate because they improperly minimized minority voting strength for "pretextual" reasons.

Most importantly, the plan -- consistent with the purpose of redistricting in the first instance -- provided citizens with fair and effective representation through the creation of districts encompassing citizens with shared economic, social and cultural interests that relate to the duties of members of Congress. The congruence between the plan and the purpose of redistricting was deliberately intended and specifically directed by the General Assembly, and was accomplished through the creation of a distinctively rural First District and distinctively urban Twelfth District. *Id.* at 467-69. To make the First District distinctively rural, the General Assembly removed Durham, at the eastern end of the Piedmont Urban Crescent, from the district as originally drawn and directed the drafters of the plan to assure that at least 80 percent of the citizens of the district resided outside cities having populations greater than 20,000. *Id.* at 467. To make the Twelfth District distinctively urban, the General Assembly modified the plan proposed by Republicans to exclude rural counties along the Virginia border and to include Durham, Winston-Salem and Gastonia with the other Piedmont Crescent urban areas. The General Assembly also directed the drafters of the plan to assure that at least 80 percent of the citizens of the district resided within cities having populations greater than 20,000. *Id.* at 468. The distinctive rural and urban natures of these districts "is a fact so much within the common knowledge of intelligent inhabitants of the State that it probably is subject to judicial notice." *Id.* at 470.

The Twelfth District extends in an arc westward from Durham through Greensboro and Winston-Salem and then southward to Charlotte and Gastonia, tracing the spine of the Piedmont Urban Crescent. Substantially industrialized and predominately urban, the Piedmont Urban Crescent is a widely recognized regional entity with historical integrity. It "is rightly

described as the 'urban, economic and cultural heart and soul of the State.'" *Id.* at 459. Consistent within its location within the Piedmont Urban Crescent, 86.3 percent of the citizens in the Twelfth District reside in urban areas as defined by the Census Bureau. "This measure of urbanness applies to African-American and white citizens alike: at least two-thirds of the district's white residents and at least three-fourths of its African-American residents live in urban areas as so defined." *Id.* at 470. In stark contrast to the urban Twelfth District, "[t]he First district is wholly within a predominately agricultural region" and "is without question predominately rural in character." *Id.* "The counties included in whole or in part within the District had 64 percent of the State's harvested croplands in 1992." "Of the State's four counties that have agriculture as their principal source of income, all are in the First District." *Id.* African-American and white citizens in the district are both burdened by socio-economic disadvantages. Among all twelve districts, African-American citizens in the First District rank last in measures of income and education and white citizens rank next to last.

"Reflecting their distinctive rural and urban natures . . . the two districts, as intended by the legislature, have correspondingly different and distinctive communities of interest. And, even more important, there are within each of the districts substantial, relatively high degrees of homogeneity of shared socio-economic -- hence political -- interests and needs among its citizens. Belying any intuitive assumption that the very bi-racial make-up and the irregularity of shape and geographical non-compactness of these districts would reflect great diversity and conflicts of interest among their citizens, both anecdotal and expert opinion evidence demonstrates the contrary." *Id.* In the rural First District, the predominance of agriculture and the relatively low socio-economic standing of its citizens give all voters significant and shared

interests, for example, in federal legislation regarding price support programs for tobacco and peanuts and in federal legislation aiding disadvantaged persons. In the urban Twelfth District, the concentration of industry and financial institutions gives all citizens significant and shared interests, for example, in federal legislation concerning trade, banking, urban development and crime.

"These individual observations are validated on a larger scale by expert opinion concerning the homogeneity of basic interests in each of the districts. Based upon reliable analyses using accepted political-social science methodology, the two districts are among the most, rather than the least, homogeneous of the current twelve, in terms of the material conditions and political opinions of their citizens, whether only its white citizens, or only its African-American, or both together are considered." *Id.*

The fact that the formation of districts based on communities of interest, instead of geographic compactness, provides for fair and effective representation of voters is further demonstrated by an examination of voter turnout under the plan. The fundamental representative connection between a member of Congress and the residents of the district is voting. By that measure, the plan adopted by the General Assembly provides fair and effective representation. "Voter participation in the 1992 congressional elections in North Carolina -- with its quite recently created, peculiarly-shaped, non-compact districts -- was higher than the national average that year. It was also higher than that in any neighboring state -- all of which had relatively more compact congressional districts overall. And it was higher than that in the 1988 congressional elections in North Carolina, when the State's districts overall were more geographically compact." *Id.* at 471.

The plan was submitted to the Department of Justice and was precleared on February 6, 1992. Soon thereafter, various Republican officials challenged the plan as an unlawful political gerrymander. That claim was dismissed by a three-judge court and this Court summarily affirmed that decision. *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C.), *aff'd*, 506 U.S. ___, 113 S. Ct. 30 (1992).

The complaint in this action was filed on March 12, 1992. This Court, on June 28, 1993, reversed the trial court's decision granting defendants' motion to dismiss for failure to state a claim, and remanded the case for trial. *Shaw v. Reno*, ___ U.S. ___, 113 S. Ct. 2816 (1993). On remand, the District Court, after allowing a motion to intervene as plaintiffs by eleven Republican voters[2] and a motion to intervene as defendants by twenty-two African-American and white voters,[3] conducted a trial from March 28, 1994 to April 2, 1994. In its opinion, as amended on August 27, 1994, the District Court rejected defendants' and defendant-intervenors' arguments that plaintiffs and plaintiff-intervenors had failed to prove they had standing to pursue their claims and that plaintiffs and plaintiff-intervenors had failed to prove the plan was a racial gerrymander. The District Court, however, did find that the plan was narrowly tailored to serve compelling interests and entered final judgment for defendants and defendant-intervenors. Separate notices of appeal were filed by plaintiffs and plaintiff-intervenors and separate jurisdictional statements were filed by them on November 21, 1994. This motion to affirm is submitted in response to both jurisdictional statements.

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[2] Plaintiff-intervenors here are essentially identical to the plaintiffs in *Pope v. Blue*, *supra*.

[3] The lead defendant-intervenor, Ralph Gingles, was the lead plaintiff in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

ARGUMENT

The State appellees believe that the District Court applied erroneous legal standards in determining that appellants had proved their standing to pursue their claims and in determining that appellants had proved a racial gerrymander. The State appellees also believe that these issues present substantial questions, the resolution of which are of great significance to the State and all its citizens. Nevertheless, the State appellees believe that full briefing and argument of these issues is not necessary because the legal standards applied by the District Court in deciding that North Carolina's congressional redistricting plan was narrowly tailored to serve compelling interests fully accord with prior decisions of this Court. Because the State met strict scrutiny standards, the standing and racial gerrymander issues need not be addressed in this case and this Court should summarily affirm the District Court's order. Should this Court determine that the strict scrutiny questions presented by appellants do constitute substantial questions which ought to be fully briefed and argued, the State appellees request that the Court also require full briefing and argument of the standing and racial gerrymander questions.

I. LEGAL STANDARDS APPLIED BY THE DISTRICT COURT IN DETERMINING THAT THE REDISTRICTING PLAN WAS NARROWLY TAILORED TO SERVE COMPELLING INTERESTS FULLY ACCORD WITH DECISIONS OF THIS COURT.

Although variously stated by the appellants in their Jurisdictional Statements, essentially they present three questions to this Court: (1) did North Carolina have a compelling interest in complying with the Voting Rights Act which justified the enactment of a race-based redistricting plan; (2) was the North Carolina redistricting plan narrowly tailored to meet the State's

compelling interest in complying with the Voting Rights Act; and (3) did the court below properly allocate the burden of proof between the parties.

These are not substantial questions requiring full briefing and argument. In applying strict scrutiny to the North Carolina congressional redistricting plan, the District Court faithfully applied *Shaw* and this Court's other decisions prescribing the legal standard for evaluation of race-conscious remedial action. *Shaw v. Hunt*, 861 F. Supp. at 434. Based on demographic, geographic, historical and political facts and circumstances unique to the State of North Carolina, facts which are largely undisputed, the District Court concluded that the General Assembly had a "strong basis in evidence" for concluding that enactment of a race-based redistricting plan was necessary to bring its congressional redistricting scheme into compliance with Sections 2 and 5 of the Voting Rights Act. *Id.* at 474. Furthermore, the District Court found, again based on largely undisputed facts, that the congressional plan creating two remedial districts was "narrowly tailored" to serve the State's compelling interest in voluntarily complying with the unique and far-reaching remedial mandates embodied in the Voting Rights Act. *Id.* at 475. The District Court's careful strict scrutiny analysis of the State's redistricting plan correctly applied the law as articulated in *Shaw* and should, therefore, be summarily affirmed.

A. Compelling State Interest

As the District Court clearly recognized, this Court's decisions firmly establish that compliance with the Voting Rights Act is a compelling interest which may require a state to engage in race-based districting.

> The Supreme Court has long recognized that a state's interest in eradicating the effects of its own past or present racial discrimination is sufficiently "compelling" to support its undertaking of race-based remedial action. *See Shaw*, ___ U.S. at ___, 113 S. Ct. at 2831; *Croson*, 488 U.S. at 491-93, 509-10 (plurality); *id.* at 518 (Kennedy, J., concurring in part and concurring in the judgment); *Wygant*, 476 U.S. at 280-82 (plurality); *id.* at 286 (O'Connor, J., concurring); *Bakke*, 438 U.S. at 307 (opinion of Powell, J.). The Court also has recognized that this interest extends to remedying past or present violations of federal *statutes* that are designed to eradicate such discrimination in particular aspects of life. *See Croson*, 488 U.S. at 500 (majority) ("constitutional or statutory violations[s]"); *Wygant*, 476 U.S. at 274-75 (plurality) (Title VII); *id.* at 289 (O'Connor, J., concurring) ("violation[s]) of federal statutory or constitutional requirements"); *Bakke*, 438 U.S. at 307-09 (opinion of Powell, J.) ("constitutional or statutory violations").

Id. at 437.

Contrary to appellants' suggestion, a state, under this Court's decisions, does not need to wait for a judicial finding that its redistricting plan violates the Voting Rights Act or make legislative findings that a redistricting plan violates the Act before it may draw a redistricting plan that deliberately attempts to give effect to minority voting strength. All that is required is that the state have a "strong basis in evidence" for concluding that such action is "necessary" to avoid a violation of the Act. *Id. See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (majority); *Wygant v. Board of Education*, 476 U.S. 267, 277-78

(1986) (plurality); *id.* at 289-90 (O'Connor, J., concurring).[4] To hold otherwise, as recognized by the District Court, would severely undermine a state's incentive to voluntarily meet its civil rights obligations and would "clearly be at odds with [the] Court's and Congress' emphasis on the value of . . . voluntary compliance" with the federal discrimination laws. 861 F. Supp. at 439 (quoting *Wygant*, 476 U.S. at 290, O'Connor, J., concurring).

The strong basis in evidence sufficient to allow a state to engage in race-based redistricting in order to comply with the Voting Rights Act is "information sufficient to support a *prima facie* showing that its failure to do so would violate the Act." 861 F. Supp. at 439. The State need not actually prove a violation of the Act in order to meet strict scrutiny. Such a requirement would impose an unfair burden on the State which would be "trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent . . . discrimination and liability to nonminorities if affirmative action *is* taken." *Wygant*, 476 U.S. at 291 (O'Connor, J., concurring). 861 F. Supp. at 439-40 & n.46.

Based on the voluminous record before it, the District Court concluded that North Carolina's General Assembly had a strong basis in evidence for concluding any congressional redistricting plan which did not contain two majority-minority districts would in fact violate Sections 2 and 5 of the Voting Rights Act. *Id.* at 474. The District Court commented particularly on the General Assembly's "powerful, recent institutional and individual memories of the acts rigor in redistricting matters," a reference to

[4] Other district courts considering challenges to congressional redistricting plans have reached this conclusion. *See Hays v. Louisiana*, 839 F. Supp. 1188, 1217 (W.D. La. 1994) (three-judge court); *Johnson v. Miller*, 864 F. Supp. 1354, 1381 (S.D. Ga. 1994) (three-judge court).

the State's unsuccessful defense of its 1981 State House and Senate redistricting plans against Section 2 challenge in *Thornburg v. Gingles*, 478 U.S. 30 (1986). 861 F. Supp. at 463. The General Assembly was also well informed on the rigors of Section 5 and the nature of the showing that the State must make to establish compliance with Section 5 standards, given its experiences with denials of Section 5 preclearance in 1981 and again in 1991 to its Congressional, House and Senate redistricting plans. *Id.*

A *prima facie* Section 2 case exists when members of a protected racial minority can show (1) their group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) their group is politically cohesive; and (3) the white majority vote sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate. *Growe v. Emison*, ___ U.S. ___, ___, 113 S. Ct. 1075, 1084 (1993); *Voinovich v. Quilter*, ___ U.S. ___, ___, 113 S. Ct. 1149, 1157 (1993). The record before the District Court established beyond dispute that the General Assembly was "specifically aware," based on information provided by the Republican Party, the ACLU and others, from advice by the Justice Department, its own redistricting experts, and from its members' personal knowledge and familiarity with North Carolina and its politics, that the State's African-American minority "could very likely make out a *prima facie* Section 2 challenge" to any redistricting plan that did not contain two majority-minority districts. 861 F. Supp. at 463. The validity of this "general perception" by the legislature was fully documented in the legislative history[5] and by the evidence

[5] A two volume legislature history containing a complete history of the redistricting process, including transcripts of public hearings, committee meetings and floor debates, along with copies of proposed maps and redistricting plans, was stipulated by the parties. *See* Stip. Ex. 200.

presented at trial. Numerous examples of plans with two majority-minority districts were presented during the redistricting process and the appellants themselves prepared maps that established the potential to create two geographically compact majority-minority districts "under any reading of *Gingles*." *Id.* at 463-65. It was common knowledge, confirmed by evidence at trial, that African-American citizens are politically cohesive in statewide and local elections and that racial bloc voting still persists to a significant degree across the state in both local and statewide elections, including those for United States Congress. *Id.* Members of the General Assembly were "necessarily aware" from their own personal experiences that a Section 2 "totality of circumstances" analysis[6] could establish the State's long history of official voting-related discrimination, the socio-economic effects of past discrimination which hinder the ability of African-Americans to participate effectively in the electoral process, the continued use of racial appeals in election campaigns,[7] and the still disproportionately low numbers of African-Americans being elected to political office. *Id.* at 461-465. Under these circumstances, the District Court's conclusion that the State legislature had a "strong basis in evidence" for concluding that a redistricting plan with two majority-minority districts was necessary to avoid violation of Section 2 of the Act accords fully with this Court's decisions.

The North Carolina General Assembly also had a "strong basis in evidence" for believing that its actions were compelled by Section 5 of the Voting Rights Act. Given the unique and forceful

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[6] The trial record included ample documentation of relevant Section 2 circumstances. *See* Stipulations Offered By Defendant-Intervenors.

[7] The "regrettable fact" of the persistence of racial appeals and tactics in political campaigning also was fully documented at trial. *See* 861 F. Supp. at 465 & n.57.

remedial purpose of Section 5 of the Voting Rights Act to break the cycle of "unremitting and ingenious defiance" of the constitutional guarantees of nondiscrimination in voting by covered jurisdictions, *South Carolina v. Katzenbach*, 383 U.S. 301, 308-09 (1966), compliance with Section 5 constitutes a compelling state interest, as acknowledged by the Court in *Shaw*, ___ U.S. at ___, 113 S. Ct. at 2830-31.[8] Logically it follows that when a state's redistricting plan is denied preclearance on the ground that it fails to satisfy the "purpose" or "effect" prong of Section 5, the state has a "strong basis in evidence" for concluding that majority-minority districts may be required to comply with Section 5. The Justice Department has been given the authority and duty to serve as a surrogate for the district court in reviewing Section 5 submissions in order to give the states a fast and inexpensive alternative to litigation in the District Court for the District of Columbia. A Section 5 objection by the Justice Department is therefore properly viewed as "an administrative finding of discrimination" which is sufficient to give a state a compelling interest in taking race-based remedial action. *Regents of the University of California v. Bakke*, 438 U.S. 265, 305 (1978) (opinion of Powell, J.). As pointed out by the District Court, to hold otherwise would be inconsistent with the federal policy of encouraging states to comply voluntarily with their obligations under federal civil rights laws and would undermine the central purpose of Section 5. 861 F. Supp. at 442-43.

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[8] Although the discussion in *Shaw* was limited to the "retrogression" standard of Section 5, the District Court properly noted this Court's well established recognition of the "purpose" prong of Section 5, which would require denial of preclearance to redistricting plans which, though non-retrogressive, have been shown not to be free from a racially discriminatory purpose. 861 F. Supp. at 441-442 & nn.31 and 32.

B. NARROW TAILORING

The District Court concluded that North Carolina's redistricting plan is narrowly tailored to meet the State's compelling interest in engaging in race-based redistricting to comply with the mandates of the Voting Rights Act. *Id.* at 475. In reaching this conclusion, the court followed this Court's decisions applying the "narrowly tailored" standard to other types of race-based remedial measures. *Id.* at 444.[9]

> In other contexts, the Supreme Court has looked to five basic factors to decide whether a race-based affirmative action program is "narrowly tailored" to further a compelling state interest in remedying identified discrimination: (i) the efficacy of alternative remedies; (ii) whether the program imposes a rigid racial "quota" or just a flexible racial "goal"; (iii) the planned duration of the program; (iv) the relationship between the program's goal for minority representation in the pool of individuals ultimately selected to receive the benefit in question and the percentage of minorities in the relevant pool of eligible candidates; and (v) the impact of the program on the rights of innocent third parties.

Id. at 445. *See United States v. Paradise*, 480 U.S. 149, 171-85 (1987) (plurality); *id.* at 186-89 (Powell, J., concurring).

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[9] *Shaw* itself does not provide guidance on the narrow tailoring analysis in the redistricting context, merely indicating that a redistricting plan would not be narrowly tailored to serve the state's interest in complying with the Voting Rights Act if it "went beyond what was reasonably necessary to avoid" a violation of the Act. ____ U.S. at ____, 113 S. Ct. at 2831.

The District Court carefully and systematically evaluated each of these established factors in light of the largely undisputed evidence. 861 F. Supp. at 445-48. Appellants only seriously contest the District Court's application of the final factor -- impact of the plan on third parties. The basis for appellants' argument is an alleged burden imposed on innocent third parties by the irregular shapes and non-compactness of the majority-minority districts in the State's plan. In their view, a district is not narrowly tailored unless it is the most geographically compact district available.

To begin with, there is no factual basis for this argument. Appellants failed to prove that the plan harms the representational interests of voters. The absence of such harm is vividly demonstrated by the level of voter turnout under the plan. Moreover, this argument is not well-founded in the law. By advancing this argument, appellants, in effect, ask this Court to elevate traditional notions of geographical compactness, contiguity, and respect for political boundaries to constitutional requirements for narrow tailoring purposes. However, in *Shaw* this Court expressly reaffirmed the long-standing rule that adherence to compactness, contiguity and the integrity of political subdivisions in state redistricting is *not* constitutionally required. *See Shaw*, ___ U.S. at ___, 113 S. Ct. at 2827 (majority); *Gaffney v. Cummings*, 412 U.S. 735, 752 n.18 (1973); *White v. Weiser*, 412 U.S. 783, 793-97 (1973).

Further, accepting appellants' argument would deny states the discretion and power reserved to them by the Constitution under the decisions of this Court. This Court has repeatedly emphasized that redistricting is fundamentally a political task and a matter for state determination. *See Growe v. Emison*, ___ U.S. at ___, 113 S. Ct. at 1081; *Voinovich v. Quilter*, ___ U.S. at ___,

113 S. Ct. 1149, 1156-57 (1993). Within this area of state domain, the Court has recognized the validity of rational redistricting principles including protection of incumbents and communities of interest. *See, e.g., Gaffney v. Cummings*, 412 U.S. at 754 (recognizing voting strength of political parties); *White v. Weiser*, 412 U.S. at 791 (preserving the core constituencies of incumbent); *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966) (avoiding contests between incumbents). The inevitable balancing of many different and conflicting interests required in the redistricting process must be left to the state legislatures because they are the organs of government best situated to identify and reconcile these interests. *Growe v. Emison*, ___ U.S. at ___, 113 S. Ct. at 1081; *Connor v. Finch*, 431 U.S. 407, 414-15 (1977). The District Court correctly concluded, after surveying this Court's established precedents, that a rule elevating compactness, contiguity and respect for political subdivisions to constitutional imperatives would "'confuse the purpose of *Shaw's* strict scrutiny standard,' which is not to ensure that the state creates wise or aesthetically-pleasing districts, but to ensure that it 'is not covertly pursuing forbidden ends' when it draws district lines." 861 F. Supp. at 451 (quoting Pildes & Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights*, 92 Mich. L. Rev. 483, 584-85 (1993)).

Appellants would rewrite narrow tailoring in the redistricting context to require the states to abandon rational and traditional redistricting goals such as recognizing historical, cultural and economic communities of interest and preserving the core constituencies of incumbents at the expense of their favored goal of geographic compactness. The District Court refused appellants' invitation to become embroiled in "second-guessing" the "wisdom of legislative judgments about how best to balance competing districting considerations that are not themselves of constitutional stature," 861 F. Supp. at 453-54 & n.49, and refused to reject the

districts drawn by the North Carolina General Assembly based on "rational districting principles" deliberately designed to reflect the "material conditions and interests" of the State's citizens. *Id.* at 475. This Court should likewise refuse appellants' invitation.

Appellants also posit the theory that the remedial districts are not narrowly tailored because they do not incorporate the specific compact minority populations which in their view triggered the State's compelling interest in complying with Sections 2 and 5 of the Voting Rights Act. This argument, like their other arguments, is not supported by the facts.

The District Court's opinion succinctly summarized the evidence establishing the congruence of the remedial districts with Section 5 coverage and Section 2 litigation. The rural First District was drawn in areas of the Coastal Plain with long histories of Sections 2 and 5 compliance problems. The history of race relations in this area was presented through expert and lay testimony and was not disputed by appellants' lay witnesses or experts. Although many of the counties in the Twelfth District are not covered by Section 5, all of its counties have been subject to Section 2 litigation. For example, all of the urban areas included in the Twelfth District were involved in the *Gingles* litigation. It strains credulity for appellants to argue that many of the African-Americans receiving the benefits of being placed in the First or Twelfth Districts are not minorities "who at some earlier time had been precluded from equal political participation." Shaw Juris. Stat. at 24.

C. Burden of Proof

Appellants' final challenge is to the District Court's holding that "plaintiffs retain the ultimate burden of persuading the court either that the proffered justification is not compelling or that

the plan is not narrowly tailored to further it." 861 F. Supp. at 436.

This was not error. The District Court's holding accords precisely with opinions of this Court in reverse discrimination cases under the Equal Protection Clause.[10] In a reverse-discrimination case, where members of the majority race are challenging state affirmative action measures the "ultimate burden remains with the [plaintiff] to demonstrate the unconstitutionality of the affirmative-action program." *Wygant*, 476 U.S. at 277-78 (plurality). Proof that the challenged state action is race-based can give rise to a presumption of unconstitutionality and thereby shift the burden to the state to demonstrate that its use of race was justified by a compelling governmental interest. *Croson*, 488 U.S. at 505 (majority). However, the burden for the state is one of *production* only, not *persuasion*. To prevail on an equal protection claim, plaintiffs always must "bear the ultimate burden of persuading the court that the [state's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the [remedial action] instituted on the basis of this evidence was not sufficient 'narrowly tailored.'" *Wygant*, 476 U.S. at 292-93 (O'Connor, J., concurring).

The District Court's judgment in this case reflects a careful balancing of the mandates of the Voting Rights Act and the Equal Protection Clause as required by *Shaw*. The balance struck by the District Court based on the facts and circumstances of this case is in full accord with the strict scrutiny principles developed in earlier

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[10] It also accords with the decisions of other district courts considering challenges to redistricting plans under *Shaw v. Reno*. *See Johnson v. Miller*, 864 F. Supp. 1354, 1385; *Vera v. Richardson*, 861 F. Supp. 1304, 1336-37 (S.D. Tex. 1994) (three-judge court).

opinions of this Court and its judgment should be summarily affirmed.

II. SUBSTANTIAL QUESTIONS, HOWEVER, EXIST REGARDING THE DISTRICT COURT'S DECISION THAT APPELLEES HAD PROVED THEY HAD STANDING TO PURSUE THEIR CLAIMS.

The District Court held:

> We understand Shaw necessarily to have implied a standing principle that accords standing to challenge a race-based redistricting plan to any voter who can show that it has assigned him to vote in a particular electoral district in part at least because of his race.

861 F. Supp. at 427.

This holding was erroneous. Proof of assignment to a district based on race is necessary, but not sufficient, to prove standing to pursue a claim. Race-based assignments to districts are not in and of themselves unlawful and thus by themselves are not sufficient to prove standing to seek redress for injuries. There must, in addition, be proof that the race-based assignment caused injury to representational interests.

Injury to representational interests may not be presumed or inferred; that injury must be proved. *Davis v. Bandemer*, 476 U.S. 109, 132-33 (1986). Appellants offered no such proof at trial. Voter confusion of sufficient magnitude could harm representational interests, but it is plain from the evidence that appellants' proof did not meet that threshold. No evidence was offered by appellants that any voter failed to cast his or her ballot because of confusion about district assignment. Moreover, any

widespread voter confusion would presumably manifest itself through reduced voter turnout. There was no reduction in voter turnout at the 1992 congressional elections in North Carolina. The turnout rate in fact exceeded the turnout in prior North Carolina congressional elections.

III. SUBSTANTIAL QUESTIONS ALSO EXIST REGARDING THE DISTRICT COURT'S DECISION THAT APPELLANTS HAD PROVED A RACIAL GERRYMANDER.

At trial, appellees argued that to prove the racial gerrymander prong of their claim and trigger strict scrutiny, the appellants had the burden of establishing (1) that the redistricting plan creates districts with highly irregular shapes unaccounted for by existing political or natural boundaries; (2) that in one or more of these highly irregularly shaped districts citizens of particular racial groups are concentrated in numbers significantly disproportionate to their representation in the State's population as a whole; (3) that racial considerations caused the highly irregular shapes; and (4) that the shape of the districts has no explanation reasonably related to the purpose of redistricting other than race. Appellees further argued that appellants had the burden of proving each element; that if they proved the first three elements, the burden of production -- but not persuasion -- shifted to appellees; and that if appellees produced an explanation for the shape of the districts rationally related to the purpose of redistricting in addition to race, appellants had the burden of proving that the proffered explanation was not sustained by the evidence in order to trigger strict scrutiny analysis.

The District Court rejected appellees' argument holding that proof that deliberate racial considerations played a "substantial" or "motivating" role in the creation of highly irregularly

shaped districts, even in the face of rational explanations for the shape of the districts other than race, constituted proof of a racial gerrymander and triggered strict scrutiny. 861 F. Supp. at 431. This holding is erroneous; it reads out of the *Shaw* calculus this Court's "conclu[sion] that a plaintiff may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood *as anything other than* an effort to segregate voters into different districts on the basis of race." 113 S. Ct. at 2832 (emphasis added).

The consequences of reading an analysis of explanations for the shape of the districts other than race out of the racial gerrymander prong of a *Shaw* analysis are potentially enormous. By themselves, neither the creation of irregularly shaped districts nor the deliberate consideration of race for the purpose of complying with the Voting Rights Act is unlawful or unconstitutional. Those acts only become potentially unconstitutional when they combine to produce districts bearing no reasonable relationship to providing fair and effective representation for citizens other than race. Leaving out of the racial gerrymander calculus the other-reasonable-explanation-factor, as the District Court did, will inevitably burden the redistricting process with strict scrutiny, especially in states covered by Section 5 of the Voting Rights Act where deliberate consideration of race and racial line drawing is effectively required by federal law. Legislative bodies will be reluctant even to consider plans fully consistent with the purpose of redistricting simply because one or more districts might appear to have what some would perceive as bizarre or unusual shapes. They likewise will be reluctant even to consider plans that promote the integration of leaders of all races into the political process simply because race was deliberately accounted for in drawing such districts. In short, appearance will trump substance and strict judicial scrutiny will be the order of the day.

CONCLUSION

The State appellees respectfully submit that the questions presented by appellants are not so substantial as to need further argument. Therefore, the State appellees move the Court to affirm summarily the judgment entered in the cause by the three-judge United States District Court for the Eastern District of North Carolina.

Respectfully submitted,

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Nos. 94-923, -924

In the

Supreme Court of the United States

OCTOBER TERM, 1994

RUTH O. SHAW, *et al.*,

JAMES ARTHUR "ART" POPE, *et al.*,

Appellants,

v.

JAMES B. HUNT, JR., *et al.*,

RALPH GINGLES, *et al.*,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, Raleigh Division

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MOTION TO DISMISS OR AFFIRM OF APPELLEES RALPH GINGLES, *et al.*

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QUESTIONS PRESENTED

Intervenor-appellees Ralph Gingles, *et al.* do not agree that the broad and abstract questions described in the Jurisdictional Statements (at i) are presented to this Court in this case. Rather, the issues that the Court could decide (if it were to note jurisdiction) are framed by the extensive, specific, and amply supported factual findings made below. *On this record*, the only questions that would arise on appeal are:

1. Are the findings of fact of the district court clearly erroneous?

2. Do the appellants, who failed to present evidence sufficient to demonstrate that they suffered a concrete, personal injury as a result of the enactment of the challenged districting plan, have standing to bring this action based upon their mere assertion of abstract, subjectively perceived, stigmatic harm?

3. Did the district court err in holding that appellants had met their burden under *Shaw v. Reno* to establish that the challenged districting plan should be subject to strict scrutiny?

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Note on Citations

The following abbreviations are used throughout this Motion in citing to record documents in the case:

Shaw J.S.	Jurisdictional Statement, No. 94-923
Pope J.S.	Jurisdictional Statement, No. 94-924
J.S. App.	Appendix to Jurisdictional Statements

Note on Citations (continued)

Tr.	Transcript of trial, Spring, 1994
Stip.	Stipulations By the Parties (agreed to and signed by all parties March 21, 1994)
Def.-Int. Stip.	Stipulations Offered By Defendant-Intervenors (agreed to and signed by all parties March 21, 1994)
Exh.	Exhibits (including trial exhibits and exhibits to stipulations)
Dep.	Depositions received in evidence

Nos. 94-923, -924

In the

Supreme Court of the United States

October Term, 1994

RUTH O. SHAW, *et al.*,

JAMES ARTHUR "ART" POPE, *et al.*,

Appellants,

v.

JAMES B. HUNT, JR., *et al.*,

RALPH GINGLES, *et al.*,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, Raleigh Division

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MOTION TO DISMISS OR AFFIRM OF APPELLEES RALPH GINGLES, *et al.*[1]

Appellees Ralph Gingles, *et al.* (defendant-intervenors below) respectfully request for the following reasons that this Court dismiss these appeals pursuant to Supreme Court Rule 18.6 because appellants have failed to prove the concrete injury necessary to establish their standing, or, alternatively, summarily affirm the judgment

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[1] Appellees Ralph Gingles, *et al.* are twenty-two white and black citizens and registered voters from throughout the State of North Carolina who were granted leave to intervene as defendants below following the remand of this action by this Court in *Shaw v. Reno*, ___ U.S. ___, 113 S. Ct. 2816 (1993).

below, which carefully applied the law as articulated by this Court in *Shaw v. Reno*, ___ U.S. ___, 113 S. Ct. 2816 (1993) and was based on findings of fact, unique to North Carolina, that are well supported by the record.

STATEMENT OF THE CASE

This litigation challenges North Carolina's 1992 congressional redistricting plan on the ground that it is a racial gerrymander lacking sufficient justification under the Fourteenth Amendment to the United States Constitution. In *Shaw v. Reno*, this Court held that appellants' complaint "state[d] a [facially sufficient] claim by alleging that [the plan] . . . rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." 113 S. Ct. at 2828. In order to establish their entitlement to relief on remand, therefore, it was appellants' burden to demonstrate that the configuration of the districting plan did not result from the rational application of factors besides race and that the State had no sufficient justification for enacting the plan.

An extensive factual record was assembled on these issues in the district court. Most of the subsidiary historical facts were uncontested and the parties entered into a comprehensive set of stipulations. The parties consistently and fundamentally disagreed about the factual inferences to be drawn from the record evidence, however, and those disagreements, which were resolved by the trial court in appellees' favor, are central to these appeals. See Shaw J.S. at i (describing issue as whether court below "ma[de] clearly erroneous findings of fact"); Pope J.S. at 25 (arguing that the "factual analyses [below] are at odds with the record and are clearly erroneous"). Indeed, following the initial announcement of the ruling by the trial court, appellants filed motions pursuant to FED. R.

CIV. P. 52(b) seeking extensive supplemental and amended findings of fact; although some modifications to the opinion were made by the trial court (see Pope J.S. at 2), appellants (as noted) still quarrel substantially with the findings below.

The essential facts are set forth in the district court's opinion and summarized in the Motion to Affirm by Appellees, the Governor and other Officials of the State of North Carolina, which we do not here duplicate. In the Argument section *infra*, we touch upon many of the factual findings which it would be necessary for this Court to find "clearly erroneous" in order to reach the "questions presented" as they are framed by the appellants.

ARGUMENT

Were this Court to reach any of the legal issues sought to be presented by the appellants based upon the hypothetical versions of the facts described in their Jurisdictional Statements (which are contrary to the well-supported findings below), it should affirm the judgment of the trial court because the majority correctly understood the opinion of this Court and properly carried out the remand directions of this Court in this case, *Shaw v. Reno*, ___ U.S. ___, 113 S. Ct. 2816 (1993). See Motion to Affirm by Appellees, the Governor and other Officials of the State of North Carolina ("State appellees").

Those legal issues could appropriately be addressed by this Court, however, only if it were to set aside, as clearly erroneous, the detailed factual findings of the majority below. As the State appellees note, much of the extensive record in this matter was stipulated by the parties, and there is little if any dispute about the subsidiary historical facts relevant to this controversy.

Appellants principally contest the inferences drawn from the factual record. Because those inferences are also factual in nature, and because appellants cannot demonstrate (indeed, they have barely sought at all to do so) that they are "clearly erroneous" based upon the record, the issues sought to be raised by appellants in this Court are not actually presented by this case but are constructions which might have arisen had appellants' factual contentions not been rejected by the trial court.

In its prior ruling (*Shaw v. Reno*) this Court identified several distinct types of harms which might be caused by districting based solely upon race, and which, *if* suffered by a voter, might establish that voter's standing to challenge that districting plan in federal court. On remand, however, the appellants here failed to demonstrate, and the district court declined to find, that the districting plan in this case had in fact caused or was likely to cause any such injury. In the absence of such a showing and finding, appellants lack standing to maintain this action.

We urge that the judgment below either be summarily affirmed on the merits or be dismissed because appellants' lack of standing means that there is no federal jurisdiction over their claims.

I. THE DISTRICT COURT CORRECTLY RESOLVED THE FACTUAL ISSUES IN THIS CASE

The Jurisdictional Statements in this case reiterate the central factual contentions which the appellants advanced, but which the district court rejected, in the proceedings below. The Pope appellants repeatedly assert that "the district court's opinion contains numerous factual errors and misstatements which served in part as

the bases" for its decision (Pope J.S. at 25). The Shaw appellants similarly urge that "the majority below made numerous findings which have no evidence for support or are contrary to the overwhelming weight of the evidence" (Shaw J.S. at 30 n.45; see *id.* at 9 n.9, 10). These assertions and the more specific factual contentions of appellants discussed *infra*, reflect the intensely fact-bound nature of the instant appeal.

This Court, however, does not ordinarily note probable jurisdiction to consider such evidentiary arguments because its review is limited by FED. R. CIV. P. 52(a), which requires that the trial court's findings of fact must be upheld unless they are clearly erroneous. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 77-80 (1986) (applying "clearly erroneous" standard in direct appeal from decision of three-judge court in action under § 2 of Voting Rights Act); *City of Rome v. United States*, 446 U.S. 156, 183 (1980) (applying same standard in action under § 5 of Voting Rights Act).

> If the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the [appellate court] may not reverse it even though convinced that had it been sitting as the trier of fact it would have weighed the evidence differently.

Anderson v. Bessemer City, 470 U.S. 564, 574 (1985).[2] Deference must therefore be given to the findings of fact

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[2]This is true even where the lower court's findings do not rest upon credibility determinations. *Id.* The "clearly erroneous" standard applies to all factual findings, both ultimate facts and the subsidiary findings upon which they are based. *Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982); *see also Gingles*, 478 U.S. at 78-79 ("clearly erroneous" standard applies to ultimate finding of vote dilution).

made by the court below, so long as there is evidence to support them. In this case, the many factual findings to which appellants object are all well supported by the evidence before the trial court.

(1) Appellants insist that North Carolina's decision to enact the challenged districting plan was *not* based on any belief that a plan with fewer than two majority-minority districts would fail to comply with § 2 of the Voting Rights Act (Shaw J.S. at 11 & n.11; Pope J.S. at 26). The district court, however, rejected appellants' contentions regarding this pivotal issue (J.S. App. 90a):

> Beyond any question . . . the dominant concern driving the decision [of the legislature] was a perception that . . . any . . . congressional redistricting plan which did not contain at least two majority-minority districts . . . would in fact violate the Voting Rights Act (or be so likely to violate the Act that in prudence it must be assumed to do so).[3]

The trial court's opinion contains a detailed analysis of the evidence supporting this finding (J.S. App. 90a-95a). The court concluded that the validity of the legislature's belief "was confirmed by objective evidence adduced at trial" (J.S. App. 93a).

At the very outset of the redistricting process, before any submissions had been made to the Department

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[3]See also J.S. App. 108a:

> The General Assembly did this in order to comply with §§ 2 and 5 of the Voting Rights Act, on the basis of the well-founded belief of a sufficient majority of its membership that failure to do so would, or might well, violate one or both of those provisions.

of Justice, the legislature received and accepted the advice of independent counsel that the state would be in violation of § 2 unless it created at least one majority-black district (J.S. App. 85a). The parties also stipulated that prior to enacting any plan, the legislature had before it a variety of proposals that would have created two majority-black or majority-minority districts (*see* Stip. Exhs. 10, 23, 49, 61; J.S. App. 85a-86a.)[4]

Members of the General Assembly had knowledge of the totality of circumstances surrounding congressional, statewide and state legislative elections in North Carolina. From their experiences as legislators during the 1980's they were aware that the original congressional redistricting plan drafted in 1981 had been denied § 5 preclearance because the exclusion of politically active black voters from then-District 2 appeared to have the purpose and effect of diluting minority voting strength. A majority had participated in redrawing state legislative districts after *Gingles* to remedy violations of amended § 2 of the Voting Rights Act. (J.S. App. 90a-92a.)

A large number of successful § 2 challenges had previously been brought in the counties ultimately included within the First and Twelfth Districts. Of the 27 counties in the 1st District, 22 are covered by § 5 of the Voting Rights Act; in the *Gingles* litigation, § 2 violations were found in 11 of those counties and, since *Gingles*, 21 counties and cities in the 1st District have been the subject of challenges which resulted in changes to the method of

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[4]After the Attorney General objected to the congressional districting plan initially enacted by the legislature in 1991, but prior to adoption of the 1992 plan challenged in this litigation, an alternative which would have created three majority-minority districts was introduced in the State House of Representatives. (Stip. Ex. 10.)

election. Two of the ten counties within which the 12th District is located are covered by § 5; in the *Gingles* litigation violations were found in both counties. Since *Gingles*, § 2 suits have resulted in modification of local election systems in four of the ten counties. (J.S. App. 107a.)

The district court found that members of the legislature knew from their "own personal experiences in North Carolina politics, that conditions in North Carolina were such that the African-American minority could likely prove many of the other factors that are relevant to establishing a § 2 violation under the statute's 'totality of the circumstances' approach" (J.S. App. 92a). This finding is supported by extensive evidence of current conditions that significantly impede the ability of African-American voters in areas covered by the challenged districts to participate effectively in the political process, including the use of at-large elections in the overwhelming majority of counties and cities (Keech Dep., Exh. 2, Tables 1A, 1B; Exh. 502, Statement of Delilah Blanks, at 5, 8 [Bladen County]); the difficulty that African-American agricultural or hourly workers experience in getting to the polls without suffering a loss of needed income (Exh. 502, Statement of James Sears, at 5 [Gates County], Statement of Alice Ballance, at 8-9 [Bertie County]); and the fears generated by threats of reprisals for any political independence (*id.*, Statement of Willis Williams, at 9-11 [Martin County]).[5] It is still difficult for black voters to secure meaningful assistance at polling places (Exh. 502, Statement of Delilah Blanks, at 7-8, Statement of Oscar Blanks, at 3-4

[5]For example, as late as 1992, during the campaign of a black candidate for Martin County Commissioner, African-American voters were threatened with loss of credit at a local pharmacy if they supported him (*id.*, Statement of Willis Williams, at 9-11).

[Columbus County], Statement of Willis Williams, at 7-9, Statement of Alice Ballance, at 6-7). Black candidates have fewer financial resources and do not generally have access to the business and social contacts that have been politically indispensable for successful nominees (*id.*, Statements of Delilah Blanks, James Sears, and Alice Ballance).

Extensive evidence was presented to the district court of the continuing effects of long-maintained, massive racial discrimination against African-Americans practiced in North Carolina, including the current economic, educational and similar disadvantages disproportionately experienced by blacks in the state (see Def.-Int. Stip. Exhs. 1-26). The effects of these conditions are evident in the striking lack of black electoral success in statewide and other elections in North Carolina prior to implementation of court-ordered remedies under the Voting Rights Act.[6] It is undisputed that from 1900 until after the post-1990 redistricting, no African-American candidate was elected to the United States Senate, Congress, or any statewide non-judicial office, and only two such candidates succeeded in judicial contests prior to a redistricting occasioned by litigation (see Def.-Int. Stip. 60, 61). No black person was elected to the North Carolina General Assembly between 1900 and 1968, and at the time the *Gingles* suit was filed in 1981, there were only three African-American members of the House and one State Senator (Stip. 13, 18; Def.-Int. Stip. 77, 78). As the court below found, at the time the challenged plan was enacted "African-Americans were still not being elected to political office in the state in numbers even remotely

[6]See *Gingles*, 478 U.S. at 48 n.15 (extent to which minority group members elected to public office is among most important "Senate Report" factors supporting finding of § 2 violation).

approaching their [22%] representation in the general population, despite the fact that capable and experienced African-American candidates were running for election" (J.S. App. 82a-83a, 92a).[7]

As this Court said in *Gingles*, 478 U.S. at 46, "[t]he essence of a § 2 claim is that a certain electoral . . . structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." The preceding discussion provides examples of the extensive record support for the legislature's conclusion in 1992 that a court would have been likely to find that black voters were not yet able to participate on an equal basis in the political process in North Carolina and to elect candidates of their choice (J.S. App. 92a-93a).

(2) The Shaw appellants insist there was insufficient white bloc voting in North Carolina to support a plausible § 2 claim (Shaw J.S. at 16 n.16). The district court properly rejected this contention, finding "considerable evidence" that white bloc voting persisted (J.S. App. 93a).[8] All of the examples cited in the Shaw Jurisdictional Statement pre-date this Court's *Gingles* findings of

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[7]In 1989 blacks were consistently underrepresented in local city and county positions, especially those chosen through at-large elections (see Def.-Int. Stip. 76, 80; Keech Dep., Def. Exh. 2, Tables 1-A, 1-B, 2-A).

[8]See *id.* at 91a-92a:

> Members of the legislative leadership stated in floor debate that they believed . . . that pervasive bloc voting by the white majority allowed it usually to defeat candidates supported by the African-American minority in districts that were not majority-minority.

§ 2 violations in North Carolina, and in each instance the black candidate referred to by the appellants actually lost the election in question (see Shaw J.S. at 19-20). The trial court also made findings, not challenged by appellants here, of continued race-based appeals to white voters (J.S. App. 92a, 93a-94a & n.57).[9]

(3) Both appellants assert, albeit with little further analysis, that black voters in North Carolina are too dispersed to form the basis of a "compact" district under *Gingles* (Shaw J.S. at 16; Pope J.S. at 10, 25). The Pope appellants, for example, argue that appellees failed to adduce "proof" that the black areas were compact, and that "the record demonstrated" a lack of compactness. (Pope J.S. at 7, 25). The district court, however, rejected appellants' assessment of the evidence (J.S. App. 93a):

> The overwhelming evidence established that the state's African-American population was sufficiently large and geographically compact to constitute a majority in two congressional districts. . . .[10]

The court noted that the Pope appellants themselves had prepared plans which included two majority-minority districts which "were 'geographically compact' under any

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[9]In the proceedings that led to the passage of the redistricting plan, State Senator Walker specifically referred to the use of racial appeals in the 1990 election for U.S. Senator, and their effects upon the electorate, in urging his colleagues to support the creation of two majority-minority districts (Stip. 95, Exh. 200, at 932).

[10]See also J.S. App. 91a ("Numerous plans presented to the General Assembly had demonstrated that the State's African-American population was sufficiently large and geographically compact to constitute a majority in two congressional districts").

reading of *Gingles*" (*id.*).[11] The opinion below included detailed findings regarding the location of "major, discrete concentrations of African-American population" in specific cities and rural areas (J.S. App. 83a).

(4) The chain of events lending to the adoption of the challenged districting plan included a decision by the Department of Justice to refuse to preclear, under § 5, an initial plan that contained only a single majority-minority congressional district. The Shaw appellants now advance two slightly different factual arguments in an effort to undermine the significance of the Attorney General's § 5 objection as a factor supporting the legislature's belief that a plan with two majority-minority districts was required by the Voting Rights Act.

First, appellants urge that the Department expressly insisted that North Carolina adopt a racial "quota system" of representation, contending that the Assistant Attorney General for Civil Rights used the term "quota" in meetings with state officials (Shaw J.S. at 13 n.13). Second,

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[11]Appellants suggest that this Court's earlier opinion in *Shaw v. Reno* somehow contained a factual finding that blacks are so evenly distributed throughout the State of North Carolina that the compactness precondition of *Gingles* could never be met. But in *Shaw* this Court expressly held that the dispute regarding the compactness of North Carolina's black population was among the issues which "remain open for consideration on remand." 113 S. Ct. at 2831. Only a few years earlier, in *Gingles*, this Court had found that blacks in North Carolina *were* sufficiently concentrated to support a finding of liability under § 2 of the Voting Rights Act. The counties and black communities within which the two districts in the instant case are located are substantially the same as those involved in *Gingles* itself: the First Congressional District includes Northampton, Gates, Hartford, Bertie, Chowan, Edgecomb, Washington, Halifax, Nash and Wilson Counties, and the Twelfth District includes portions of Durham, Forsyth and Mecklenberg Counties. *See* 478 U.S. at 35 nn.1-2.

appellants interpret Assistant Attorney General Dunne's letter of December 18, 1991, denying preclearance of the earlier plan, as requiring "maximization" of majority-minority districts (*id.* at 14-15). But the district court emphatically rejected this account of the actions of and standards applied in this case by the Department of Justice.

The court below correctly concluded that in rejecting North Carolina's first plan, the Department of Justice had expressly applied, not the discriminatory effect aspect of § 5 or § 2, but the distinct prohibition in § 5 of election laws with a discriminatory *purpose* (J.S. App. 87a-88a) (emphasis added):

> On December 18, 1991, the Attorney General objected to . . . the [first] congressional redistricting plan . . . finding that the state had not met its burden, under § 5, of proving that the Plan did not have a racially-discriminatory *purpose*. . . . The letter concluded that the General Assembly's "decision to place the concentration of minority voters in the southern part of the state into white majority districts" appeared to be *designed* "to ensure the election of white incumbents while minimizing minority electoral strength."[12]

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[12]See *id.* at 51a n.29 ("[T]he Justice Department's denial of preclearance was . . . based . . . on the ground that the state had failed to meet its burden of demonstrating that the plan did not violate the 'purpose' prong of § 5 itself"); *id.* at 111a ("[T]he Justice Department had denied preclearance to [the first] plan on the ground that it failed to satisfy the 'purpose' prong of § 5"). The plausibility of this 1991 finding is supported by the fact that in 1981, under a different administration, the Attorney General had also disapproved, under § 5, a proposed congressional districting plan as racially motivated (J.S. App. 90a-91a n.55, 94a).

This finding renders largely irrelevant many of the arguments in the jurisdictional statements. Because the Justice Department's § 5 objection in 1991 was based upon a finding that the earlier districting plan was animated by a discriminatory intent to "minimiz[e] minority electoral strength," its emphasis on the legislature's devising a plan that would provide appropriate and effective opportunities for African-American participation in the election of members of Congress was completely unexceptionable; this Court has never suggested that remedies for intentional racial discrimination may not take race into account.

(5) Appellants seek reconsideration in this Court of the factual issue that was the particular focus of the proceedings on remand -- why the First and Twelfth Congressional Districts have the particular shapes noted in the Court's earlier opinion. Appellants contend that race was the sole consideration, while the State maintained below that the legislature's desire to create a distinctively rural First District and a distinctively urban Twelfth District, as well as to preserve the core areas of prior districts and protect incumbents, were of equal or greater significance. Appellants insist that the legislature had no such purposes (Pope J.S. at 23, 25 n.11; Shaw J.S. at 9 n.8, 30).

Again, the district court, in its findings, rejected appellants' contentions. For example, the court described the goals pursued by the legislature respecting creation of an "urban" and a "rural" district (J.S. App. 97a, 100a):

> [T]he redistricting committees adopted the convention that at least 80% of [the] population [of the First District] must be located outside cities having populations greater than 20,000 . . . [and] . . . a mirror-image convention to guide the Twelfth District's urban design: at least 80% of its total population must be drawn from cities with populations of 20,000 or more.[13]

The court described contemporaneous testimony and legislative debates favoring the creation of such districts (J.S. App. 96a, 102a, 104a), and the fears expressed by rural residents of the Coastal Plain that their interests would be ignored by urban voters in a mixed urban-rural district (J.S. App. 96a-97a); it expressly credited supporting testimony of the Director of the Bill Drafting Division of the General Assembly (J.S. App. 81a & n.53).[14] The district court concluded that the intent to create such districts was a critical factor in the fashioning of districts that are considerably less regular in shape than would have been the case had the State sought solely to create two majority-minority districts (J.S. App. 102a, 109a).

(6) The Shaw appellants argue that the two challenged districts in fact are not, respectively, distinctively rural and urban (Shaw J.S. at 25, 26 & nn. 37-38). This argument completely ignores the findings of the court below (J.S. App. 82a, 83a, 96a-97a, 100a-105a) describing in detail the characteristics of the two districts, as shown by the evidence: The First District includes all four of the state's counties that have agriculture as their principal source of income and most of the state's counties that rank among the top ten producers of many different agricultural commodities, including tobacco, sweet potatoes, peanuts, hogs, cotton, and corn for grain (J.S. App.

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[13]See J.S. App. 109a (noting "legislative intention to create one predominantly rural (First) and one predominately urban (Twelfth) district").

[14]See Tr. 333-35, 343-44, 350-52.

103a).[15] In contrast, 86.3% of the residents of the Twelfth District, which is located in the industrial and commercial heartland of the State, live in urban areas (*id.*).[16] The district court concluded, based on a particularly extensive record, that residents of the First District, without regard to race, shared vital common interests in agricultural issues, while residents of the Twelfth had distinct common concerns with urban problems (J.S. App. 104a):

> [T]he two districts are among the most, rather than the least, homogeneous of the current twelve, in terms of the material conditions and political opinions of their citizens, whether only its white citizens, or only its African-American, or both together are considered.

African-Americans are not the only farmers in the rural 1st District, nor the only urban dwellers in the 12th, and appellants presented no evidence whatsoever for the proposition that the homogeneity of the districts results from their racial composition.

(7) Finally, the Pope appellants suggest that the North Carolina legislature could not have known that the First and Twelfth Districts were distinctly rural and urban, respectively, because certain 1990 census data was not yet available when the lines were drawn (Pope J.S. at 25). At the time the districting plan was enacted, however, state officials actually had detailed census data revealing the

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[15]Stip. 123.

[16]District 12 contains more banking institutions than any Congressional district in the nation apart from the district containing Wall Street in New York City (Tr. 932).

population down to the census tract level (J.S. App. 79a, 97a). The district court, moreover, properly concluded that the rural or urban nature of particular areas was a matter of common knowledge in North Carolina, particularly to state legislators who lived and campaigned regularly in those very regions (J.S. App. 82a, 102a, 104a n.58).

II. THE OTHER LEGAL ISSUES ADVANCED BY APPELLANTS ARE INSUBSTANTIAL ON THIS RECORD

The remaining arguments raised by appellants concern issues not presented by the opinion and judgment below or questions already definitively resolved by prior decisions of this Court.

(1) Both appellants urge the Court to address the legal and constitutional issues that might be raised if the Department of Justice were to utilize an unduly expansive interpretation of the "effect" prong of §§ 2 or 5 of the Voting Rights Act (Pope J.S. at 14-15; Shaw J.S. at 12-15). In the instant case, however, the Justice Department action was expressly grounded upon the "purpose" prong of § 5, and the appeal thus simply does not present such issues, which the district court explicitly did not decide (J.S. App. 51a n.29, 87a-88a, 109a).[17] See *supra* pp. 12-14.

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[17]See J.S. App. 51a n.29:

> [S]ince the Justice Department's denial of preclearance was not based on the ground that the proposed plan was in . . . violation of § 2, but on . . . the "purpose" prong of § 5 itself . . . [w]e need not address plaintiff-intervenors' argument that the Justice Department has exceeded its authority under § 5 by incorporating the § 2 "results" standard into a § 5 preclearance analysis.

(2) The Pope appellants assert that the district court gave insufficient weight to the particular shape of the districts in this case (Pope J.S. at 6-8). The shape of a challenged district is critical under *Shaw v. Reno* to determining whether a challenged plan should be subjected to strict scrutiny. But in the instant case the district court ruled *for* appellants on that threshold issue and in fact subjected the two challenged districts to that searching review (J.S. App. 7a, 110a). No purpose would be served by reanalyzing the evidence regarding an issue on which the appellants themselves already prevailed below.

(3) The Shaw appellants insist that the district court adopted an "implicit" holding that only black officeholders can adequately represent black voters (Shaw J.S. at 22). But the district court opinion contains no such holding; on the contrary, the court below stressed that the plan does not impose a rigid quota for African-American representation because, as is the case in other majority-minority districts in North Carolina, non-minority candidates can and have been elected from them (see J.S. App. 60a n.40, 108a). This is demonstrated by the past experience with majority-minority districts for State legislative seats: "Of the eight majority-minority House and Senate districts created to comply with § 2 of the Voting Rights Act pursuant to the judgment in *Gingles*, three are presently represented by whites . . ." (J.S. App. 108a). In the first Democratic primary under the challenged plan, a white candidate won the most votes in the First Congressional District and came within one percentage point of attaining 40% of the total vote, which would have resulted in his nomination (Stip. 129, Exh. 64, at 29).

(4) The Pope appellants complain that the court below assertedly erred in failing to recognize that "the *defendants* . . . have the burden of producing evidence

that remedial action was appropriate" (Pope J.S. at 21) (emphasis in original). But the district court placed precisely that burden on the defendants: "[T]he state's burden . . . is producing evidence that the plan's use of race is narrowly tailored to further a compelling state interest . . ." (J.S. App. 43a; see *id.* at 110a). Both appellants also urge the Court to note probable jurisdiction to decide which party in a case such as this bears the burden of proof as to the existence of a compelling state interest (Shaw J.S. at 29-30; Pope J.S. at 23). The district court expressly held that the defendants had indeed met that burden,[18] so a decision sustaining appellants' contention that the defendants bear that burden would not affect the outcome of the instant case.

(5) The Pope appellants insist that § 2 of the Voting Rights Act can never be invoked to justify a non-court-ordered districting plan; rather, they argue, a court can consider that provision of the Act only in a § 2 suit brought by blacks to challenge a districting plan favorable to whites (Pope J.S. at 10, 14, 16, 17). On this view, it would be unconstitutional for a state to comply voluntarily

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[18]See J.S. App. 111a-113a (emphasis added):

> *The state has adequately established* that it had a 'compelling interest' in enacting a race-based congressional districting plan . . . . *The state has adequately established* that the Plan creating the two remedial districts was 'narrowly tailored' . . . . First, *the state has demonstrated* that the Plan does not create more majority-minority districts than is reasonably necessary . . . . Second, *the state has demonstrated* that the Plan does not impose a rigid quota for African-Americans' representation . . . . Third, *the state has demonstrated* that the Plan is a remedial measure of limited duration . . . . Finally, *the state has demonstrated* that the Plan does not impose an undue burden on the rights of innocent third parties . . . .

with § 2; rather, a state would be obligated to violate § 2 knowingly and then await a court-ordered remedy. However, the Court's decision in *Shaw v. Reno* expressly recognized that a state would have a sufficiently compelling interest in voluntarily complying with the requirements of § 2, 113 S. Ct. at 2830.

(6) The Shaw appellants insist that race-based districting can *never* be justified by a compelling state interest and is thus unconstitutional *per se* (see Shaw J.S. at 17-18 & n.18). Every member of the Court in *Shaw v. Reno*, however, rejected that contention; the majority held that the "bizarre" districts described in the Court's opinion were not unconstitutional *per se*, but rather are subject to strict scrutiny.[19]

(7) The Shaw appellants argue against the remedial creation of majority-minority districts because "the mobility of the American population" means that such districts will benefit blacks who did not live in the area during past periods of discrimination and will affect newly arrived whites who did not perpetuate discrimination in that particular location (Shaw J.S. at 18). This Court was certainly aware when it decided *Shaw* that voters constantly move into and out of districts; it would not have directed an inquiry into the justifications for particular districts if it had thought that population mobility would automatically determine the outcome of any such analysis.

The attempt by appellants to import "innocent victim" concepts from other areas of the law would

[19]*See, e.g.*, 113 S. Ct. at 2830 ("If appellants' allegations of a racial gerrymander are not contradicted on remand, the District Court must determine whether the General Assembly's reapportionment plan satisfies strict scrunity").

embroil this Court in definitional difficulties of almost unimaginable proportions. For example, the Court would have to determine who are "voters who had no connection with the past discrimination" (Shaw J.S. at 18). Would that category include only election officials who impeded the registration of African-American citizens in the past? legislators who enacted dilutive apportionment plans that were stricken under the Voting Rights Act? voters who elected the legislatures that enacted those plans? In this case, as noted above, the Attorney General objected to the initial 1991 redistricting plan adopted by the North Carolina legislature on the ground that it appeared to be *purposefully discriminatory*. That discriminatory act was not long in the past and was committed by a legislature for whose members it is likely that all of the appellants voted. Professor Shimm, for example, has resided in North Carolina for more than 34 years and at one time had been active in partisan politics (Shimm Dep. at 6-8).

More significantly, adoption of appellants' suggestion would completely eviscerate the Voting Rights Act, contrary to the clear Congressional purpose recognized and effectuated by this Court in a long line of decisions. Under appellants' approach, a finding that the political process is not equally available to minority voters, the bedrock finding that establishes a violation of § 2 of the Voting Rights Act, *Gingles*, 478 U.S. at 44, 80, is of no import. Appellants would require courts and legislatures to ignore these conditions, rather than remedy them, solely because the remedy may change the district -- *not dilute the vote* -- of a citizen who may not have resided within the jurisdiction at the time some discrete act of prior discrimination took place. Such an approach would effectively repeal the Act and finds no support whatsoever in the statute, its legislative history, or the prior decisions of this Court interpreting it.

(8) Finally, the Pope appellants contend that because congressional districting plans are ordinarily in effect for a ten-year period (until the next census), majority-minority districts are unconstitutional no matter how compelling the state's interest in creating them. See Pope J.S. at 20 ("[a] decade-long 'remedy' is not, by definition, a limited remedy"). To the contrary, any measure which automatically expires in a decade is operational for only a limited period of time. Whatever period of time might be thought appropriate in other contexts, a redistricting plan which remains in effect until the next census is surely appropriate. In analogous circumstances, notwithstanding the Equal Protection requirement of one-person-one-vote, the States are permitted to keep the same districts in use for a full decade after each census, despite the fact that population shifts invariably result in differences in district populations that would have been unconstitutional if present at the beginning of the period. *See Reynolds v. Sims*, 377 U.S. 533, 583-84 (1964).

(9) Appellants' other, equally insubstantial, contentions are addressed in the State appellees' Motion to Affirm.

III. THE APPELLANTS FAILED TO DEMONSTRATE AS A MATTER OF FACT THAT THEY WERE PERSONALLY INJURED BY THE DISPUTED DISTRICTING PLAN

> The party invoking federal jurisdiction bears the burden of establishing th[e] elements [of standing, including "injury in fact"] . . . . Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of

> proof, i.e. with the manner and degree of *evidence* required at the successive stages of the litigation . . . . [T]hose facts . . . must be "supported adequately by the *evidence* adduced at trial."

Lujan v. Defenders of Wildlife, 504 U.S. ___, 113 S. Ct. 2130, 2136-37 (1992) (emphasis added).

In the instant case appellants were obligated to prove at trial that the challenged districts had in fact caused at least one of the injuries described by this Court in *Shaw v. Reno*: (1) the state's overall districting plan diluted the votes of the group to which the plaintiffs belong, 113 S. Ct. at 2828, (2) the lines of the challenged district had the effect of "exacerbat[ing] . . . patterns of bloc voting", *id.* at 2827, or (3) the boundaries of that district prompted the officials elected from it to "represent a particular racial group," of which the plaintiffs were not members, "rather than their constituency was a whole," *id.* at 2828.

In the proceedings on remand the appellants did not, of course, claim North Carolina's districting plan diluted the votes of whites. *See Shaw v. Reno*, 113 S. Ct. at 2823. Nor did appellants contend that racial bloc voting has increased since the 1991 enactment of the districting plan at issue; to the contrary, the Shaw appellants maintain bloc voting in North Carolina is actually on the decline (see Shaw J.S. at 19-20). The appellants proffered some anecdotal opinion apparently intended to show that the Representative from the Twelfth District was unresponsive to the interests of whites, but the district court was not persuaded that any such injury had in fact occurred (J.S.App. 105a):

> [There is] no convincing evidence in the record that . . . these two districts have had or are having

> any significant adverse effect upon their citizens' interests in fair and effective representation -- in matters of voting or access to their elected representatives. Indeed, such evidence as there is on the matter predominates in the other direction.[20]

The district court acknowledged "that the plaintiffs have not even alleged, much less proved, the sort of 'injury in fact' required by" this Court's past standing decisions (J.S. App. 21a) but mistakenly believed that this Court in *Shaw* had tacitly revolutionized standing law, insisting that *Shaw* would not "countenance" requiring a plaintiff in a case such as this to "demonstrate that it has raised some sort of concrete and material injury to his political interest" (J.S. App. 25a n.13). Rather, it held (J.S. App. 26a): "[W]e understand *Shaw* necessarily to have *implied* a standing principle that accords standing to challenge a race-based districting plan to any voter . . ." (emphasis added).

Nothing in *Shaw*, however, purported to abolish, expressly or by implication, the requirement that a

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[20]See also J.S. App. 115a ([W]hite voters['] . . . voting rights have been in no legally cognizable way harmed by the plan"). Appellants present only snippets of leading cross-examination questions to "corroborate[]" their assertion that the Representative elected in District 12 views his mandate as being to represent only black voters (Shaw J.S. at 7 n.6). They do not provide this Court with the full context of Rep. Watt's remarks and explanatory testimony, which indicates that he is concerned about and responsive to constituents of all races within his district. See Tr. 936-45, 957-60, 995-1003; Exh. 502, Statement of Melvin L. Watt, at ¶¶ 16-18; see also Exh. 502, Statements of Ellen Emerson, Charles Lambeth, Jr., Jennifer McGovern, and Dr. Bernard Offerman (white voters in the 12th District who expressed satisfaction with representation of *their* interests being provided by Congressman Watt).

plaintiff show "concrete and material injury." Indeed, nothing in *Shaw* purported to address any general issue of standing law. The only question actually resolved in *Shaw* was one of substantive Equal Protection law,[21] and the Court expressly refused to note probable jurisdiction over a standing question raised by the Shaw appellants in their 1992 Jurisdictional Statement.[22] The majority in *Shaw* emphasized that increased bloc voting or official indifference to the interest of a distinct racial group were "harms . . . cognizable under the Fourteenth Amendment," 113 S. Ct. at 2828. Such an identification of the specific harms which, if *proven*, would establish standing, would have made no sense if the Court had meant to abolish *by implication* the longstanding requirement that there be any demonstrable harm at all.

The district court cited *Allen v. Wright*, 468 U.S. 737, 755 (1984), as holding that any "use of racial classifications *necessarily* inflicts 'stigmatic' injury" (J.S. App. 22a) (emphasis added). But *Allen* held precisely the opposite, insisting that a claim of stigma was sufficient to support standing only "in some circumstances" -- specifically, those in which a plaintiff had also been injured by denial of a

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[21]113 S. Ct. at 2832 ("Today we hold *only* that appellants have stated a claim under the Equal Protection Clause . . .") (emphasis added).

[22]See Jurisdictional Statement, No. 92-357, at i ("Do white voters have standing to seek relief from congressional redistricting which was intended by both the state and federal defendants to result in the election of minority persons to Congress from two majority-minority districts?"). In noting probable jurisdiction the Court directed that "[a]rgument shall be *limited* to the following question" (*viz.*, whether an intention to comply with the Voting Rights Act precluded a finding of discriminatory intent in the adoption of a districting plan). 508 U.S. __, 113 S. Ct. 653 (1992) (emphasis added).

concrete benefit accorded to others. 468 U.S. at 755. *Allen* stressed that a claim of stigmatic injury is never sufficient to support standing unless accompanied by proof of

> some *concrete* interest with respect to which respondents are personally subject to discriminatory treatment. That interest must *independently* satisfy the causation requirement of standing doctrine.

Id. at 757 n.22 (emphasis added). This Court rejected a stigma-based standing claim in *Allen* precisely because the plaintiffs there were not able to prove they had suffered some other concrete injury sufficient by itself to support standing. *Id.* On essentially identical facts the court below mistakenly reached the opposite result, recognizing that there was no "concrete and material injury" (J.S. App. 25a n.13), and then holding that an abstract claim of stigma was nonetheless sufficient by itself (J.S. App. 22a-23a).

In *Diamond v. Charles*, 476 U.S. 54 (1986), a pediatrician sought to defend the provisions of an abortion statute against constitutional attack in furtherance of his concern for "the standards of medical practice that ought to be applied to the performance of abortions," *id.* at 66. This Court held that that the doctor had no standing:

> Although Diamond's allegation may be cloaked in the nomenclature of a special professional interest, it is simply the expression of a desire that the Illinois Abortion Law as written be obeyed. Article III requires more than a desire to vindicate value interests.

476 U.S. at 66. *Diamond* is controlling here. What appellants seek is to "vindicate [their] value interests" by having

the legislature adopt a redistricting plan that conforms to their personal interpretation of what the Equal Protection Clause requires, even though they cannot demonstrate that they have suffered any concrete injury.

In the circumstances of this case, the claim of "stigma" is particularly fanciful. The two appellants who live in District 12 apparently feel stigmatized by the fact that they live in a district intentionally created as a majority-minority district, even though white voters constitute 45.21% of the voting-age population. They do not claim, however, that they or any other *whites* were placed within District 12 on the basis of race. To the contrary, it necessarily follows from appellants' arguments that white voters were placed in District 12 either by happenstance or, at the very least, *in spite of*, and *not because of*, their race. *See Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979). The remaining appellants are whites who live in majority-white districts; they are not, however, complaining that they have been stigmatized by being excluded from a majority-black Congressional district.

In the absence of Article III standing, neither this Court nor any other federal court has jurisdiction. Accordingly, *Allen v. Wright* and *Diamond v. Charles* require that the instant appeals be dismissed for want of federal jurisdiction.

IV. THE APPELLANTS FAILED TO MEET THEIR THRESHOLD BURDEN UNDER THIS COURT'S DECISION IN *SHAW V. RENO*

In *Shaw v Reno* this Court spelled out specifically the allegation which the appellants were required to substantiate on remand before the challenged congressional districting plan would be subject to strict scrutiny:

> that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood *only* as an effort to *segregate* voters into separate voting districts because of their race

113 S. Ct. at 2832 (emphasis added). That was precisely the allegation advanced by the Shaw appellants when this case was before this Court in October Term, 1992.[23]

On remand to the district court, however, the nature of the appellants' claim shifted dramatically.[24] First, the appellants declined to pursue any claim that the First and Twelfth Districts were "segregate[d]." The abandonment of that allegation was precipitated by undisputed evidence that (unlike the area excised from the city of Tuskegee in *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960), which was 100% black), the First and Twelfth Districts were almost evenly integrated, 50.5% and 53.5% black, respectively (J.S. App. 108a, 113a). These two districts are in fact more evenly integrated than virtually any other congressional districts in the nation, and more integrated than any in modern North Carolina history,

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[23]*See Shaw*, 113 S. Ct. at 2823:

> What appellants object to is redistricting legislation that is so extremely irregular on its face that it rationally can be viewed *only* as an effort to *segregate* the races for purposes of voting . . . without sufficient compelling justification.

[24]See J.S. App. 26a:

> Plaintiffs . . . contend that . . . strict scrutiny applies to any districting plan in which consideration of race is shown to have played a "substantial" or "motivating" role in the line-drawing process, even if it was not the only factor that influenced that process.

including the remaining districts in the challenged plan, all of which are heavily white. It is therefore not surprising that the Shaw appellants' Jurisdictional Statement conspicuously makes no mention of the specifically framed allegation of "segregation" which they pressed in this Court less than two years ago.

Second, neither appellant any longer contends that the boundaries of the First and Twelfth Districts "can be understood *only* as an effort to segregate voters" or to achieve any other racial purpose. All the judges below agreed that various aspects of the lines were in fact an effort to achieve non-racial goals, such as to create distinctively urban and rural districts, to preserve communities of interest, and to protect incumbents (J.S. App. 96a-101a, 109a, 121a n.6, 127a n.11); to the extent that the lines were drawn for such non-racial purposes, they obviously cannot be understood "only as an effort" to achieve some racial end. Far from attacking this finding, the Shaw appellants now embrace it; in their current Jurisdictional Statement they argue that the challenged districts are unconstitutional precisely because they are in part an effort to achieve *non*-racial goals such as incumbency protection, favoring particular prospective candidates, or "needl[ing] the president pro tempore of the Senate" (Shaw J.S. at 27). But the argument which the Shaw appellants now advance -- that the lines are invalid because they are *not* solely an effort to segregate voters -- is precisely the opposite of the position they urged on this Court barely two years ago.

Despite the failure of appellants to substantiate, or even reassert, the allegations that are the touchstone of the cause of action upheld in *Shaw v. Reno*, the district court mistakenly applied strict scrutiny to the districting plan. Under a standard more deferential to the important

State interests that shaped North Carolina's 1992 Congressional redistricting, that judgment is unquestionably correct. This Court should accordingly affirm the judgment below without reviewing the district court's application of the strict scrutiny standard.

CONCLUSION

For the above reasons, this Court should dismiss the appeal herein or summarily affirm the decision of the court below.

Respectfully submitted,

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IN THE
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as Governor of the State of North Carolina, *et al.*,
Appellees,
and
RALPH GINGLES, *et al.*,
Appellee-Intervenors.

On Appeal from the United States District Court
for the Eastern District of North Carolina
Raleigh Division

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM

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Nos. 94-923, 94-924

IN THE
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INTRODUCTION

After the plaintiff-appellants (Shaw *et al.*) and the plaintiff-intervenor appellants (Pope *et al.*) had filed and personally served their jurisdictional statements on November 21, 1994, the State-appellees (Hunt *et al.*) filed a motion to affirm on December 22, 1994; and on December 30, 1994, the defendant-intervenor appellees

(Gingles *et al*) filed a motion to dismiss or affirm.[1] The appellees contested the standing of appellants (S.A.M. 21-22; G.A.M. 22-27); and they disputed the district court's determination that North Carolina's congressional districts were racially gerrymandered. (S.A.M. 22-23; G.A.M. 29). Also, appellees claimed that the District Court properly applied the test of "strict scrutiny" to the North Carolina plan. (S.A.M. 22; G.A.M. 4-22). Pursuant to Rule 18.8 of the Rules of the Supreme Court, this brief in opposition addresses appellants' standing; the racial gerrymandering of the congressional districts; and the district court's failure to apply "strict scrutiny".

I. APPELLANTS' STANDING WAS CLEARLY ESTABLISHED.

In ruling that the appellants had established their standing, the district court properly concluded that this Court's decision in *Shaw v. Reno*, ___U.S.___, 113 S.Ct. 1816 (1993) "necessarily ... implied a standing principle that accords standing to challenge a race-based redistricting plan to any voter who can show that it has assigned him to vote in a particular electoral district in part at least because of his race". (App. J.S. 26a; *Shaw v. Hunt*, 861 F.Supp 408, 427 (E.D.N.C. 1994)). If appellees wished to challenge the lower court's ruling as to appellants' standing, they should have cross-appealed.

In any event, the district court's interpretation of *Shaw v. Reno* is clearly correct. Because "racial classifications with respect to voting carry particular dangers" and "may balkanize us into competing racial factions", (113 S.Ct. at 2832), it follows logically that *any* registered voter is entitled to sue to prevent this result.

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1 The motion of the State appellees is referred to hereinafter as "S.A.M." and that of the defendant-intervenors as "G.A.M."

Indeed, so long as the Fourteenth Amendment entitles "any person within" North Carolina's jurisdiction to equal protection of its laws, how can standing be denied registered voters to attack a redistricting plan which "bears an uncomfortable resemblance to political apartheid" (113 S.Ct. at 2827); which "reinforces the perception that members of the same racial group -- regardless of their age, education, economic status, or the community in which they live -- think alike, share the same political interests and will prefer the same candidates at the polls" (*id.*.); and which "reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole"? (113 S.Ct. at 2828) By its emphasis on the widespread injury that results from an unmistakable racial gerrymander, the Court "inferentially decided [appellants] had constitutional standing to sue". [2]

Appellants' standing is also derived from the statutory requirement that "[in each State] there shall be established by law a number of districts equal to the number of Representatives to which such State is ... entitled". 2 U.S.C. § 2c. Presumably Congress imposed this requirement because it was convinced that the election of Representatives at large or from multimember districts would adversely affect the quality of the representation provided to constituents. However, as was explained in *Vera*, single-member congressional districts also do not promote effective representative government

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2 See *Vera v. Richards* (hereinafter *Vera*), 861 F.Supp. 1304, 1331, n.38 (S.D.Tex. 1994). There the three-judge court expressed its agreement with the "reasoning and conclusions" expressed in *Shaw v. Hunt* as to registered voters' standing to challenge racial gerrymanders. *Ibid.*

when traditional redistricting principles are ignored in drawing those districts.[3]

Even a glance at the North Carolina statute delineating the congressional district boundaries (App. J.S. 169a-240a) or at the map showing those boundaries (113 S.Ct. at 2833) makes clear that the redistricting plan disregarded every "traditional districting principle". By so doing, the plan harmed representative government for the reasons pointed out in *Vera, supra,* n.3. This harm was inflicted because the General Assembly violated the congressional intent implicit in 2 U.S.C. § 2c. As

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3 See *Vera, supra* at 1334-35, n.43:

Traditional objective districting criteria are a concomitant part of truly "representative" single-member districting plans. Organized political activity takes place most effectively within neighborhoods and communities; on a larger scale, these organizing units may evolve into media markets and geographic regions. When natural geographic and political boundaries are arbitrarily cut, the influence of local organizations is seriously diminished. After the civic and veterans groups, labor unions, chambers of commerce, religious congregations and school boards are subdivided among districts, they can no longer importune *their* Congressman and expect to wield the same degree of influence that they would if all their members were voters in his district. Similarly, local groups are disadvantaged from effectively organizing in an election campaign because their numbers, money, and neighborhoods are split. Another casualty of abandoning traditional district principles is likely to be voter participation in the electoral process. A citizen will be discouraged from undertaking grassroots activity if, for instance, she has attempted to distribute leaflets in her congressman's district only to find that she could not locate its boundaries. ...

As the influence of truly local organizations wanes, that of special interests waxes. Incumbents are no longer as likely to be held accountable by vigilant, organized local interests after those interests have been dispersed. The bedrock principle of self-government, the interdependency of representatives and their constituents, is thus undermined by ignoring traditional districting principles.

participants in representative government, registered voters like the appellants suffered direct injury and, therefore, they have standing to sue for relief.

II. THE REDISTRICTING PLAN WAS AN UNMISTAKABLE RACIAL GERRYMANDER

Appellees seek now to question the district court's decision that the redistricting plan is subject to "strict scrutiny" because it is a racial gerrymander. The Court should reject this new attempt to evade the State defendant-appellees' earlier concession that the plan was racially gerrymandered. (See App. J.S. 26a-38a, 110a; 861 F.Supp. at 427-434, 473-474). Furthermore, not having cross-appealed from the judgment below, the appellees have waived the right to dispute that the congressional districts were racially gerrymandered.

Appellees purport to rely on the language of the Court's holding in *Shaw v. Reno* that "appellants have stated a claim under the Equal Protection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race". (113 S.Ct. 2832). This argument misreads the Court's intent in using the word "only" -- which obviously was meant to exclude a hypothetical situation where "a legislature could show that it would have enacted precisely the same plan even if it had not considered race at all". (See App. J.S. 34a. n.18, 861 F.Supp. at 432, n.18). The Court, however, never intended to limit "strict scrutiny" to those situations where the race-based plan was the result "only" of racial considerations. Otherwise, as was pointed out in *Hays v. Louisiana,* 839 F.Supp. 1188, 1202 (W.D.La. 1993), a state could avoid "strict scrutiny" of an admitted and overt racial gerrymander so long as it could

show that the legislature had also taken into account some other factor -- such as incumbency protection -- in drawing boundaries. Such an outcome would conflict with the Court's established precedent. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977); *Hunter v. Underwood*, 471 U.S. 222, 231 (1985).

III. THE DISTRICT COURT UNQUESTIONABLY MISAPPLIED THE "STRICT SCRUTINY" TEST.

From its purported "strict scrutiny" of the redistricting plan, the district court concluded that the state had adequately demonstrated a "compelling interest" and "narrow tailoring". The appellees now contend that the questions appellants present concerning this conclusion are too insubstantial to warrant briefing and oral argument. The implausibility of this contention is made apparent by Chief Judge Voorhees' extensive dissent in the district court (App. J.S. 116a-154a; 861 F.Supp. 476-497), and by Circuit Judge Edith Jones' opinion in *Vera*, 861 F.Supp. at 1333, n.40 and at 1343-44, n.55. Indeed, as Judge Jones correctly points out, "By all accounts, North Carolina's majority-minority districts, like those of Texas, are among the most distorted in the nation. If those districts survive constitutional close scrutiny, then *Shaw* may be a meaningless exercise". (861 F.Supp. at 1333, n.40.)

In upholding the racial gerrymander, the district court found as a "compelling interest" that the General Assembly had created two majority-black districts "in order to comply with §§ 2 and 5 of the Voting Rights Act, on the basis of the well-founded belief of a sufficient majority of its membership that failure to do so would, or might well, violate one or both of these provisions". (App. J.S. 108a; 861 F.Supp. at 473). Absent this "perceived compulsion", such legislative action would not

have taken place. (*Ibid.*)

In *Shaw v. Reno*, the Court observed that states "have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and as applied" (113 S.Ct. 2830).[4] However, North Carolina's plan was the result of the General Assembly's surrender to the heavy-handed "maximization" policy of the Civil Rights Division [5] -- a policy which exceeded statutory authority [6] and was unconstitutional.[7]

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4 In its context the Court's language seems chosen to suggest that this interest -- although "very strong" -- is not of itself "compelling". Since this interest was the only one accepted by the district court, the redistricting plan should have failed the "strict scrutiny" test.

5 The General Assembly first enacted a redistricting plan which contained a single majority-black district. In seeking preclearance of this plan under Section 5, it submitted an extensive Memorandum to the Department of Justice on October 14, 1991 (See App. J.S. 123a n.9; 861 F.Supp. at 480-81 n.9). This Memorandum -- which was submitted in the names, *inter alia*, of House Speaker Daniel T. Blue and House Redistricting Committee Co-Chair Toby Fitch (both African-Americans) -- apparently reflected the belief of the Legislature's leadership at that time that a single majority-black district met the requirements of the Voting Rights Act. Pursuant to its policy of "if-you can, you must", the Civil Rights Division denied preclearance because it concluded that, if traditional districting principles were ignored, two majority-black districts could be created. The implementation of this same policy is reflected not only in the record here but also in *Hays v. Louisiana*, 839 F.Supp. 1188, 1196-97 (W.D.La. 1993); and *Johnson v. Miller*, 864 F.Supp. 1354, 1360-69 (S.D.Ga. 1994).

6 *Hays v. Louisiana, supra* at 1196-97, n.21 (W.D..La. 1993).

7 "To erect the goal of proportional representation is to erect an implicit quota for black voters" and is unconstitutional. *Johnson v. Miller, supra*, at 1379 (S.D.Ga.1994).

Such acquiescence fulfilled no State interest -- "compelling", "very strong", or otherwise.

The appellees also insist that the General Assembly believed that the State's African-American minority could present a convincing Section 2 challenge to any redistricting plan which did not contain two majority-minority districts. (S.A.M. 13) The Memorandum which the General Assembly submitted to the Department of Justice on October 14, 1991, makes clear that the General Assembly had a belief diametrically opposed to the belief attributed to it by appellees and by the majority in the district court.

As the Memorandum makes clear, this belief was supported by the well-founded conviction that no one who attacked North Carolina's first redistricting plan for the failure to create two minority-black districts could prove the three threshold conditions: geographical compactness of the minority group; its political cohesiveness; and bloc voting by the white majority. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); *Shaw v. Reno*, *supra* at 2831. The first condition is especially difficult to meet because, as a matter of mathematics and geometry, the "relative dispersion" of the black population makes it impossible to create two geographically compact districts in which a majority of the voting age population is black.[8] Nothing

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8 Blacks constitute a majority of the general population in only five of the State's 100 counties; (113 S.Ct. at 2820); and four of those counties have only a small population. Because of the substantial population of Native-Americans in Robeson County (North Carolina's largest county in area), it would be easier to create two districts in which whites were a minority than two districts in which blacks were a majority. Moreover, it is indisputable that two majority-black districts could be created that are more "geographically compact" than North Carolina's First and Twelfth Districts. To appellants -- but not to appellees or to the majority in the district court -- this

in the legislative record indicates that the General Assembly changed its belief -- as expressed in the Memorandum of October 14, 1991, to the Department of Justice -- that a redistricting plan with only one majority-black district would comply with Section 2 of the Voting Rights Act. In short, the legislative history makes clear that enactment of the second redistricting plan resulted from the General Assembly's conclusion that to contest the denial of preclearance would be too costly and time-consuming and from a perception by the Democratic leadership that it could create two "bizarre" majority-black districts without imperiling Democratic incumbents. No "compelling interest" can be extracted from this history!

If, however, there had been any "compelling interest" to justify enactment of a plan with two majority-black districts, the plan enacted was not "narrowly tailored", for it went far "beyond what [is] reasonably necessary" to further any such interest. *See, Hays v. Louisiana*, *supra* at 1206-07.[9] As the defendants did not dispute at trial, two majority-black districts could have been created which were more "geographically compact" than the First and the Twelfth Districts in the redistricting plan. Such districts would have imposed a lighter burden on the "rights and interests" of North Carolina citizens

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circumstance demonstrates the absence of "narrow tailoring". *Cf. Vera*, *supra* at 1343-44, n.55.

9 As *Hays* observes, "just as a homicide defendant may not use excessive force to stop an agressor, neither may a state burden the rights and interests of its citizens more than is reasonably necessary to further the compelling governmental interest advanced by the State". *Ibid.*

and would have less flagrantly created a "perception" of racial segregation and of reliance on racial stereotypes. As is clear from all the evidence, the General Assembly gave no consideration to such alternatives.[10] Likewise, the majority in the district court ignored the possibility of creating two majority-black districts which were more in accord with "traditional districting principles" than those in the North Carolina plan. By so doing, the majority abdicated its responsibility to assure that the remedy adopted by the General Assembly had been "narrowly tailored". See *Vera v. Richards, supra* at 1343-44, n.55.

CONCLUSION

The appellees' motions should be denied. The questions they seek to raise are insubstantial. However, the questions presented by appellants merit the Court's careful consideration with full briefing and argument.

Respectfully submitted,

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January 8, 1995

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10 The announced criteria for redistricting adopted by the General Assembly never included "compactness" or "community of interest"; and the criterion of "contiguousness" was applied in a unique way. In sum, for the General Assembly it was "anything goes" in drafting the second redistricting plan, so long as it met the "quota" of two black Representatives from North Carolina.

(8) (6)

Nos. 94-923 and 94-924

Supreme Court, U.S.
FILED
SEP 22 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RUTH O. SHAW, *et al.*,

Appellants,

v.

JAMES B. HUNT, JR., *et al.*,

Appellees,

and

RALPH GINGLES, *et al.*,

Appellees.

JAMES ARTHUR "ART" POPE, *et al.*,

Appellants,

v.

JAMES B. HUNT, JR., *et al.*,

Appellees,

and

RALPH GINGLES, *et al.*,

Appellees.

Appeal from the United States District Court
Eastern District of North Carolina,
Raleigh Division

JOINT APPENDIX
Volume I of II
(pages JA-1 through JA-300)

[Counsel listed on inside front cover]

JURISDICTIONAL STATEMENTS FILED NOVEMBER 21, 1994
JURISDICTION NOTED JUNE 29, 1995

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DOCKET ENTRIES IN THE DISTRICT COURT

U. S. DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

Civil Docket for Case #: 92-CV-202

SHAW, et al v. HUNT, et al

Filed: 03/12/92

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* * * *

Proceedings include all events

[Date—Number—Proceeding.]

3/12/92—1—Complaint and Motion for Preliminary and permanent injunction and for temporary restraining order seeks three-judge court, declaration that Congressional districts of State of NC are unconstitutional & defts. to submit redistricting plan prior to elections; costs & atty's fees. (jj) [Entry date 03/16/92]

3/12/92———Summons(es) issued for William P. Barr, John Dunne, James G. Martin, James Gardner, Daniel T. Blue, Rufus L. Edmisten, NC Board of Election, M.H. Hood Ellis, Gregg O. Allen, William A. Marsh, Ruth Turner, Jane K. Youngblood (jj) [Entry date 03/16/92]

3/12/92———Filing Fee Paid; FILING FEE $ 120 RECEIPT # 18290 (jj) [Entry date 03/16/92]

3/13/92—2—Acknowledgement of service by Edwin Speas, Senior Deputy Atty. General as to James G.

Martin, James Gardner, Daniel T. Blue, Rufus L. Edmisten, NC Board of Election, M. H. Hood Ellis, Gregg O. Allen, William A. Ruth Turner, June K. Youngblood 3/12/92 Answer due on 4/1/92 for June K. Youngblood, for Ruth Turner, for William A. Marsh, for Gregg O. Allen, for M. H. Hood Ellis, for NC of Election, for Rufus L. Edmisten, for Daniel T. Blue, for James Gardner, for James G. Martin (js) [Entry date 03/19/92]

3/25/92—3—Return of service executed as to William P. Barr, John Dunne 3/16/92 Answer due on 5/15/92 for John Dunne, for William P. Barr (js) [Entry date 03/26/92]

3/26/92—4—Order assigning Judge Richard L. Voorhees to the Eastern District of North Carolina for the period from 3-13-92 to 112/31/92. signed by Ervin, J.. OB Ref: MISC. O.B. #7, p. 225 (js) [Entry date 04/14/92]

3/26/92—5—Order of Designation of Three-Judge Court - the panel will consist of Judge Dickson Phillips of the 4th Circuit, Judge Richard Voorhees of the Western District of NC, & Judge Earl Britt. signed by Ervin, J. OB Ref: CIV. O.B. #117, p. 103. cy. to J. Britt. cys. to Speas, Renfer & Everett. (js) [Entry date 04/14/92]

3/26/92——Case Assigned to panel of Judge W. E. Britt and Judge Richard L. Voorhees and Judge James D. Phillips Jr. (js) [Entry date 04/14/92]

3/26/92—6—Order, set motion filing deadline for 4/13/92, Response to motion due 4/20/92, Reply to Response to Motion due 4/23/92, Motion hearing set for 4/27/92 at 10:00 am signed by Britt, J. cys. served on counsel, panel, & Joyce. (js) [Entry date 04/14/92]

4/9/92—7—Motion by (State Defts.) James G. Martin, James Gardner, Daniel T. Blue, Rufus L. Edmisten, NC Board of Election, M. H. Hood Ellis, Gregg O. Allen to dismiss. cy. to panel. (js) [Entry date 04/14/92]

4/9/92—8—Memorandum by (State Defts.) James G. Martin, James Gardner, Daniel T. Blue, Rufus L. Edmisten, NC Board of Election, M. H. Hood Ellis, Gregg O. Allen in support of [7-1] motion to dismiss. cy. to panel. (js) [Entry date 04/14/92]

4/13/92—9—Motion by (Federal Defts.) William P. Barr, John Dunne to dismiss. cy. to panel. (js) [Entry date 04/14/92]

4/13/92—10—Memorandum by (Federal Defts.) William P. Barr, John Dunne in support of [9-1] motion to dismiss. cy. to panel. (js) [Entry date 04/14/92]

4/17/92—11—Amended complaint by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock , adding :amends [1-1] complaint. cy. to panel. (js) [Entry date 04/24/92]

4/17/92—12—Memorandum by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock in support of [11-1] amended complaint. cy. to panel. (js) [Entry date 04/24/92]

4/20/92—13—Response by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock to [9-1] motion to dismiss, [7-1] motion to dismiss. cy. to panel. (js) [Entry date 04/24/92]

4/23/92—14—Reply by James G. Martin, James Gardner, Daniel T. Blue, Rufus L. Edmisten, NC Board of Election, M. H. Hood Ellis, Gregg O. Allen, William A. Marsh, Ruth Turner, June K. Youngblood to response to [7-1] motion to dismiss. cy. faxed to panel. (js) [Entry date 04/24/92]

4/23/92—15—Reply By William P. Barr, John Dunne to response [9-1] Motion to dismiss. cy. faxed to panel. (js) [Entry date 04/24/92]

4/24/92———Motion(s) submitted: [9-1] motion to dismiss submitted, [7-1] motion to dismiss submitted to J. Britt for 4/27/92 hearing. (js)

4/27/92———Motion hearing re: [9-1] motion to dismiss Motion hearing held, [7-1] motion to dismiss Motion hearing held on 4/27/92, Ctrm. #2, Seventh Floor, Raleigh, NC before Three Judge Court of: Britt, J., Voorhees, C.J., & Phillips, J. Counsel for pltfs.: Robinson Everett; Counsel for State: Jefferson Powell, Tiare Smiley, Norma Harrell; Counsel for Fed.: Rebecca Wertz & Gerald Hebert. Carol Williams, Ct. Rptr. State & Fed. claims are dismissed. Memorandum Opinion forthcoming. Time: 1 1/2 hours. (js)

4/27/92—16—Order granting [9-1] motion to dismiss, granting [7-1] motion to dismiss signed by Britt, J. (for entire panel). OB Ref:CIV. O.B. #118, p. 17. cys. served. (js) [Edit date 04/27/92]

4/27/92—17—Judgment for William P. Barr, John Dunne, James G. Martin, James Gardner, Daniel T. Blue, Rufus L. Edmisten, NC Board of Election, M. H. Hood Ellis, Gregg O. Allen, William A. Marsh, Ruth Turner, June K. Youngblood against Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock. THIS ACTION IS DISMISSED. signed by Skinner, deputy clerk. OB Ref: CIV. O.B. #118, p. 18. cys. served. (js) [Edit date 04/27/92]

4/27/92———Case closed (js) [Entry date 04/28/92]

5/1/92———Transcript Filed - regarding hearing on Motions to Dismiss before Judges Britt, Voorhees & Phillips on 4/27/92 at 10:00 am. Court Reporter - Carol Williams (js) [Entry date 05/04/92]

5/4/92———Mailed original transcript to J. Phillips for his use. (js)

5/27/92—18—Notice of appeal to U.S. Supreme Court by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock. (tc)

8/7/92—19—Findings of fact and conclusions of law signed by J. Dickson Phillips & W. Earl Britt; dissent by Richard Voorhees OB Ref: CIV. O.B. #119, p. 86. cys. served. (js) [Entry date 08/30/92]

12/14/92—20—Order - probable jurisdiction is noted by U.S. Supreme Court. (Signed by U.S. Supreme Court.) (tc) [Entry date 01/19/93]

12/22/92———Transmitted record on appeal to U.S. Supreme Court consisting of Vol. 1 - pleadings, index and trans. ltr. CC to pltf. and deft. (tc)

1/5/93—73—Memorandum by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock in support of [72-1] motion to substitute Dr. Ronald E. Weber for Dr. Peter A. Morrison as an expert witness. cys. to panel. (js) [Entry date 01/06/94]

6/29/93—21—Opinion from U.S. Supreme Court - reversing and remanding to USDC. (ah) [Entry date 06/30/93]

8/2/93—22—Motion by James B. Hunt, Dennis A. Wicker, Daniel T. Blue Jr., Rufus L. Edmisten, NC Board of Election, Edward J. High, Jean H. Nelson, Larry Leake, Dorothy Presser, June K. Youngblood to substitute parties & amend the caption (js) [Entry date 08/13/93]

8/3/93—23—Order granting [22-1] motion to substitute parties & amend the caption signed by Britt, J. cys. served. (js) [Entry date 08/13/93]

8/5/93—24—Order - It is ardered [sic] and adjudged by this cot [sic] that the judgmetn [sic] of the above court in this cause is reversed with costs and the case is remanded to the U.S. District Court for the Eastern District of North Carolina for further proceedings in conformity with the opinion of this court. It is further ordered that the appellants, Ruth O. Shaw, et al, recover from Janet Reno, Attorney General, et al., Threen [sic] Hundred Dollars ($300.00) for their costs herein expended. signed by William Suter, Clerk Supreme Court lc Judge Britt. (ms) [Edit date 08/13/93]

8/5/93———**Remove appeal flag - no further appeals pending (ms)

8/5/93———Case reopened (js) [Entry date 08/13/93]

8/6/93—25—Order - That the appellants, Ruth O. Shaw, et al. recover from the state appellees Three Hundred Dollars ($300.00) for their costs herein expended. signed by William Suter. lc Judge Britt. (ms) [Entry date 08/09/93] [Edit date 08/13/93]

8/6/93—26—Answer to Complaint by James B. Hunt, Dennis A. Wicker, Daniel T. Blue Jr., Rufus L. Edmisten, NC Board of Election, Edward J. High, Jean H. Nelson, Larry Leake, Dorothy Presser, June K. Youngblood (js) [Entry date 08/13/93]

8/9/93—27—Request for Discovery Stipulation: Stipulation on Discovery due by 9/1/93 (js) [Entry date 08/13/93]

8/16/93—28—Motion to intervene by Ralph Gingles, Virginia Newell, George Simkins, N. A. Smith, Ron Leeper, Alfred Smallwood, Oscar Blanks, David Moore, Robert L. Davis, C. R. Ward, Jerry B. Adams,

Jan Valder, Bernard Offerman, Jennifer McGovern, Charles Lambeth, Ellen Emerson, Lavonia Allison, George Knight, Leto Copeley, Woody Connette, Roberta Waddle, William M. Hodges. cy. to panel. (js) [Entry date 08/23/93]

8/16/93—29—Memorandum by Ralph Gingles, Virginia Newell, George Simkins, N. A. Smith, Ron Leeper, Alfred Smallwood, Oscar Blanks, David Moore, Robert L. Davis, C. R. Ward, Jerry B. Adams, Jan Valder, Bernard Offerman, Jennifer McGovern, Charles Lambeth, Ellen Emerson, Lavonia Allison, George Knight, Leto Copeley, Woody Connette, Roberta Waddle, William M. Hodges in support of [28-1] motion to intervene by Ralph Gingles, Virginia Newell, George Simkins, N. A. Smith, Ron Leeper, Alfred Smallwood, Oscar Blanks, David Moore, Robert L. Davis, C. R. Ward, Jerry B. Adams, Jan Valder, Bernard Offerman, Jennifer McGovern, Charles Lambeth, Ellen Emerson, Lavonia Allison, George Knight, Leto Copeley, Woody Connette, Roberta Waddle, William M. Hodges. cy. to panel. (js) [Entry date 08/23/93]

8/25/93—30—Order, Response to motion reset to 8/27/93 for [28-1] motion to intervene by Ralph Gingles, Virginia Newell, George Simkins, N. A. Smith, Ron Leeper, Alfred Smallwood, Oscar Blanks, David Moore, Robert L. Davis, C. R. Ward, Jerry B. Adams, Jan Valder, Bernard Offerman, Jennifer McGovern, Charles Lambeth, Ellen Emerson, Lavonia Allison, George Knight, Leto Copeley, Woody Connette, Roberta Waddle, William M. Hodges signed by Britt, J. OB Ref: CIV. O. B. #124, p. 101. counsel called & cys. served to counsel & panel. (js) [Entry date 08/26/93]

8/27/93—31—Stipulation on Discovery. cys. to panel. (js) [Entry date 08/30/93]

8/27/93—32—Response by James B. Hunt, Dennis A. Wicker, Daniel T. Blue Jr., Rufus L. Edmisten, NC Board of Election, Edward J. High, Jean H. Nelson, Larry Leake, Dorothy Presser, June K. Youngblood to [28-1] motion to intervene by Ralph Gingles, Virginia Newell, George Simkins, N. A. Smith, Ron Leeper, Alfred Smallwood, Oscar Blanks, David Moore, Robert L. Davis, C. R. Ward, Jerry B. Adams, Jan Valder, Bernard Offerman, Jennifer McGovern, Charles Lambeth, Ellen Emerson, Lavonia Allison, George Knight, Leto Copeley, Woody Connette, Roberta Waddle, William M. Hodges. cys. to panel. (js) [Entry date 08/30/93]

8/27/93—33—Response by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock to [28-1] motion to intervene by Ralph Gingles, Virginia Newell, George Simkins, N. A. Smith, Ron Leeper, Alfred Smallwood, Oscar Blanks, David Moore, Robert L. Davis, C. R. Ward, Jerry B. Adams, Jan Valder, Bernard Offerman, Jennifer McGovern, Charles Lambeth, Ellen Emerson, Lavonia Allison, George Knight, Leto Copeley, Woody Connette, Roberta Waddle, William M. Hodges. cy. to panel. (js) [Entry date 08/30/93]

8/27/93—34—Memorandum by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock in support of [33-1] motion response. cy. to panel. (js) [Entry date 08/30/93]

8/27/93—35—Motion by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock for more definite statement as to the state defts.' 3rd, 5th & 6th defense. cy. to panel. (js) [Entry date 08/30/93]

9/7/93—36—Order granting [28-1] motion to intervene by Ralph Gingles, Virginia Newell, George Simkins, N. A. Smith, Ron Leeper, Alfred Smallwood, Oscar

Blanks, David Moore, Robert L. Davis, C. R. Ward, Jerry B. Adams, Jan Valder, Bernard Offerman, Jennifer McGovern, Charles Lambeth, Ellen Emerson, Lavonia Allison, George Knight, Leto Copeley, Woody Connette, Roberta Waddle, William M. Hodges signed by Britt, J. (for the court) OB Ref: CIV. O. B. #125, p. 16. cys. served. cys. to panel. (js) [Entry date 09/10/93]

9/7/93—36—Answer to Complaint by Ralph Gingles, Virginia Newell, George Simkins, N. A. Smith, Ron Leeper, Alfred Smallwood, Oscar Blanks, David Moore, Robert L. Davis, C. R. Ward, Jerry B. Adams, Jan Valder, Bernard Offerman, Jennifer McGovern, Charles Lambeth, Ellen Emerson, Lavonia Allison, George Knight, Leto Copeley, Woody Connette, Roberta Waddle, William M. Hodges (js) [Entry date 09/22/93]

9/8/93—37—Response by James B. Hunt, Dennis A. Wicker, Daniel T. Blue Jr., Rufus L. Edmisten, NC Board of Election, Edward J. High, Jean H. Nelson, Larry Leake, Dorothy Presser, June K. Youngblood to [35-1] motion for more definite statement as to the state defts.' 3rd, 5th & 6th defense (js) [Entry date 09/10/93]

9/8/93—38—Order on Scheduling by Judge Britt setting Discovery cutoff 12/15/93 Deadline for filing of all motions 12/31/93 Expert Witness List due on 10/15/93, No of Interrogatories: 75, and No of Depositions: 15. cys. to panel, attys. & Joyce. (js) [Entry date 09/10/93]

9/10/93—39—Order denying [35-1] motion for more definite statement as to the state defts.' 3rd, 5th & 6th defense signed by Britt, J. (for the court) OB Ref: CIV. O. B. #125, p. 20. cys. to attys. & panel. (js)

9/13/93—40—Motion to intervene by the Americans For Defense of Constituional [sic] Rights, Inc. (js) [Entry date 09/22/93]

9/13/93—41—Memorandum by Americans for Def. in support of [40-1] motion to intervene by the Americans For Defense of Constitutional [sic] Rights, Inc. (js) [Entry date 09/22/93]

9/13/93—42—Motion to intervene by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. DeLapp Jr., Richard S. Sahlie, The NC Repub. Party, Jack Hawke. cys. to panel. (js) [Entry date 09/22/93]

9/13/93—43—Memorandum by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. DeLapp Jr., Richard S. Sahlie, The NC Repub. Party, Jack Hawke in support of [42-1] motion to intervene by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. DeLapp Jr., Richard S. Sahlie, The NC Repub. Party, Jack Hawke. cys. to panel. (js) [Entry date 09/22/93]

9/15/93—44—Certificate of service by Americans for Def. re: Motion to Intervene. (js) [Entry date 09/22/93]

9/22/93—45—Response by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock to [42-1] motion to intervene by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. DeLapp Jr., Richard S. Sahlie, The NC Repub. Party, Jack Hawke (js)

9/22/93—46—Response by James B. Hunt, Dennis A. Wicker, Daniel T. Blue Jr., Rufus L. Edmisten, NC Board of Election, Edward J. High, Jean H. Nelson, Larry Leake, Dorothy Presser, June K. Youngblood to [40-1] motion to intervene by the Americans for

Defense of Constituional [sic] Rights, Inc. cys. to panel. (js)

9/30/93—47—Response by James B. Hunt, Dennis A. Wicker, Daniel T. Blue Jr., Rufus L. Edmisten, NC Board of Election, Edward J. High, Jean H. Nelson, Larry Leake, Dorothy Presser, June K. Youngblood to [42-1] motion to intervene by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. DeLapp Jr., Richard S. Sahlie, The NC Repub. Party, Jack Hawke. cys. to panel. (js) [Entry date 10/01/93]

10/4/93—48—Response by Ralph Gingles, Virginia Newell, George Simkins, N. A. Smith, Ron Leeper, Alfred Smallwood, Oscar Blanks, David Moore, Robert L. Davis, C. R. Ward, Jerry B. Adams, Jan Valder, Bernard Offerman, Jennifer McGovern, Charles Lambeth, Ellen Emerson, Lavonia Allison, George Knight, Leto Copeley, Woody Connette, Roberta Waddle, William M. Hodges to [42-1] motion to intervene by James Arthur "Art" Pope, Betty S. Justice, Doris Laile, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. DeLapp Jr., Richard S. Sahlie, The NC Repub. Party, Jack Hawke. cy. to panel. (js) [Entry date 10/12/93]

10/4/93—49—Response by Ralph Gingles, Virginia Newell, George Simkins, N. A. Smith, Ron Leeper, Alfred Smallwood, Oscar Blanks, David Moore, Robert L. Davis, C. R. Ward, Jerry B. Adams, Jan Valder, Bernard Offerman, Jennifer McGovern, Charles Lambeth, Ellen Emerson, Lavonia Allison, George Knight, Leto Copeley, Woody Connette, Roberta Waddle, William M. Hodges to [40-1] motion to intervene by the Americans For Defense of Constituional [sic] Rights, Inc. cy. to panel. (js) [Entry date 10/12/93]

10/4/93———Informal Status conference held on 10/4/93 before J. Britt. Dana Cunningham allowed to proceed pro hac vice for deft.-intervenors. (js) [Entry date 10/15/93]

10/12/93—50—Reply by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. DeLapp Jr., Richard S. Sahlie, The NC Repub. Party, Jack Hawke to response to [42-1] motion to intervene by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. DeLapp Jr., Richard S. Sahlie, The NC Repub. Party, Jack Hawke. cys. to panel. (js) [Entry date 10/13/93]

10/14/93—51—Motion for Elaine R. Jones, Theodore M. Shaw, Charles Stephen Ralston and Gailon W. McGowen, Jr. to appear pro hac vice for the deft.-intervenors. cy to J. Britt. (js) [Entry date 10/15/93]

10/14/93—52—Reply by Americans for Def. to response to [40-1] motion to intervene by the Americans For Defense of Constituional [sic] Rights, Inc. cys. to panel. (js) [Entry date 10/15/93]

10/14/93—53—Response by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock in support of [42-1] motion to intervene by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. DeLapp Jr., Richard S. Sahlie, The NC Repub. Party, Jack Hawke. cys. to panel. (js) [Entry date 10/15/93]

10/21/93—54—Order granting [51-1] motion for Elaine R. Jones, Theodore M. Shaw, Charles Stephen Ralston and Gailon W. McGowen, Jr. to appear pro hac vice for the deft.-intervenors signed by Britt, J. cys. to panel. cys. served. (js) [Entry date 10/25/93]

10/26/93—55—Motion by James B. Hunt, Dennis A. Wicker, Daniel T. Blue Jr., Rufus L. Edmisten, NC Board of Election, Edward J. High, Jean H. Nelson, Larry Leake, Dorothy Presser, June K. Youngblood with memorandum in support for protective order. cy. to panel. (js) [Entry date 11/14/93]

10/26/93—56—Motion by James B. Hunt, Dennis A. Wicker, Daniel T. Blue Jr., Rufus L. Edmisten, NC Board of Election, Edward J. High, Jean H. Nelson, Larry Leake, Dorothy Presser, June K. Youngblood to shorten time for response to mot. for prot. order or altern., for temporary protective order. cy. to panel. (js) [Entry date 11/14/93]

10/27/93—57—Temporary Protective Order granting [55-1] motion for protective order, granting [56-1] motion to shorten time for response to mot. for order or altern., for temporary protective order signed by Britt, J. OB Ref: CIV. O. B. #125, p. 125. cys. to counsel & panel. (js) [Entry date 11/14/93]

11/3/93—58—Order GRANTING [42-1] motion to intervene by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. DeLapp Jr., Richard S. Sahlie and Jack Hawke, individually. The motion to intervene is DENIED as to The NC Repub. Party and Jack Hawke in his official capacity as chairman of the Rep. Party. DENYING [40-1] motion to intervene by the Americans For Defense of Constituional [sic] Rights, Inc. The plf. intervenors are allowed on the condition that that adopt the amended complaint as their own, and that they adhere to the discovery schedule on 9/8/93. signed by Phillips, J.. OB CIV. O. B. #126, p. 1. cys. served. (js) [Entry date 11/14/93]

11/10/93—59—Motion by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat

Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. DeLapp Jr., Richard S. Sahlie, Jack Hawke for Michael Hess to appear pro hac vice (js) [Entry date 11/18/93]

11/15/93—60—Response by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. DeLapp Jr., Richard S. Sahlie, Jack Hawke to [55-1] motion for protective order. cys. to panel. (js) [Entry date 11/18/93]

11/16/93—61—Response by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock to [55-1] motion for protective order. cys. to panel. (js) [Entry date 11/18/93]

11/22/93—62—Interrogatories propounded by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. DeLapp Jr., Richard S. Sahlie, Jack Hawke to James B. Hunt, Dennis A. Wicker, Daniel T. Blue Jr., Rufus L. Edmisten, NC Board of Election, Edward J. High, Jean H. Nelson, Larry Leake, Dorothy Presser, June K. Youngblood. cys. to panel. (js) [Entry date 11/23/93]

11/29/93—63—Motion for Thomas Goldstein to file amicus brief. w/attach. brief. cys. to panel. (js) [Entry date 12/06/93]

11/30/93—64—Reply by James B. Hunt, Dennis A. Wicker, Daniel T. Blue Jr., Rufus L. Edmisten, NC Board of Election, Edward J. High, Jean H. Nelson, Larry Leake, Dorothy Presser, June K. Youngblood to response to [55-1] motion for protective order. cys. to panel. (js) [Entry date 12/06/93]

12/3/93—65—Motion by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson,

Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. DeLapp Jr., Richard S. Sahlie, Jack Hawke to compel defts.' response to pltf.-int. 1st set of interr.. cys. to panel. (js) [Entry date 12/06/93]

12/3/93—66—Memorandum by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. DeLapp Jr., Richard S. Sahlie, Jack Hawke in support of [65-1] motion to compel defts.' response to pltf.-int. 1st set of interr. cys. to panel. (js) [Entry date 12/06/93]

12/7/93—67—Motion by James B. Hunt, Dennis A. Wicker, Daniel T. Blue Jr., Rufus L. Edmisten, NC Board of Election, Edward J. High, Jean H. Nelson, Larry Leake, Dorothy Presser, June K. Youngblood with memorandum in support for protective order regarding Notices of Deposition. cys. to panel. (js) [Entry date 12/08/93]

12/10/93—68—Amended Order on Scheduling - the responses to the discovery motions shall be filed w/in 10 days. No replies will be permitted to discovery motions. Judge Denson is appointed to assist the judges for discovery & non-dispositive matters. cys. to panel & counsel. (js) [Entry date 12/13/93]

12/10/93———Letter From: Edwin Speas Re: Defendants' Withdrawal of mot. for protective order regarding Notice of Deposition. cys. to panel. (js) [Entry date 12/13/93]

12/10/93———Withdrawal of [67-1] motion for protective order regarding Notices of Deposition (js) [Entry date 12/13/93]

12/14/93———Withdrawal of [66-1] motion to compel defts.' response to pltf.-int. 1st set of interr. - pursuant to 12/14/93 letter from pltf. intervenors. (js) [Entry date 12/28/93]

12/17/93—69—Document filed by intervenor-defendant Ralph Gingles, intervenor-defendant Virginia Newell, intervenor-defendant George Simkins, intervenor-defendant N. A. Smith, intervenor-defendant Ron Leeper, intervenor-defendant Alfred Smallwood, intervenor-defendant Oscar Blanks, intervenor-defendant David Moore, intervenor-defendant Robert L. Davis, intervenor-defendant C. R. Ward, intervenor-defendant Jerry B. Adams, intervenor-defendant Jan Valder, intervenor-defendant Bernard Offerman, intervenor-defendant Jennifer McGovern, intervenor-defendant Charles Lambeth, intervenor-defendant Ellen Emerson, intervenor-defendant Lavonia Allison, intervenor-defendant George Knight, intervenor-defendant Leto Copeley, intervenor-defendant Woody Connette, intervenor-defendant Roberta Waddle, intervenor-defendant William M. Hodges titled: GINGLES INTERVENORS' SUPPLEMENTAL IDENTIFICATION OF LAY WITNESSES. cy. to panel. (js) [Entry date 12/28/93]

12/20/93—70—Order on Scheduling by the Court setting Discovery cutoff 1/14/94; parties shall submit stipulation of facts by 1/28/94; The pretrial conference is tentatively set for 2/4/94. cys. served to counsel & panel. cy. to J. Todd. (js) [Entry date 12/28/93]

12/22/93—71—Order denying [63-1] motion for Thomas Goldstein to file amicus brief signed by Phillips, J. cys. served to counsel, panel & Mr. Goldstein. (js) [Entry date 12/28/93]

12/28/93———Terminated document mot. to appear phv - moot. (js)

1/5/94—72—Motion by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock to substitute Dr. Ronald E. Weber for Dr. Peter A. Morrison as an expert witness (js) [Entry date 01/06/94]

1/10/94—74—Response by James B. Hunt, Dennis A. Wicker, Daniel T. Blue Jr., Rufus L. Edmisten, NC Board of Election, Edward J. High, Jean H. Nelson, Larry Leake, Dorothy Presser, June K. Youngblood to [72-1] motion to substitute Dr. Ronald E. Weber for Dr. Peter A. Morrison as an expert witness. cys. to panel. (js) [Entry date 01/18/94]

1/11/94—75—Response by Ralph Gingles, Virginia Newell, George Simkins, N. A. Smith, Ron Leeper, Alfred Smallwood, Oscar Blanks, David Moore, Robert L. Davis, C. R. Ward, Jerry B. Adams, Jan Valder, Bernard Offerman, Jennifer McGovern, Charles Lambeth, Ellen Emerson, Lavonia Allison, George Knight, Leto Copeley, Woody Connette, Roberta Waddle, William M. Hodges to [72-1] motion to substitute Dr. Ronald E. Weber for Dr. Peter A. Morrison as an expert witness. cys. to panel. (js) [Entry date 01/18/94]

1/20/94—76—Order granting [72-1] motion to substitute Dr. Ronald E. Weber for Dr. Peter A. Morrison as an expert witness, set bench trial before Judges Britt, Phillips & Voorhees for 3/28/94 in Raleigh signed by Britt, J. OB Ref: CIV. O. B. #127, P. 10. cys. to counsel, panel & J. Todd. (js) [Entry date 01/24/94]

1/20/94—77—Motion by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock, James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. DeLapp Jr., Richard S. Sahlie, Jack Hawke with memorandum in support to compel. cys. to panel. (js) [Entry date 02/02/94]

1/24/94—78—Motion by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock in limine. cys. to panel. (js) [Entry date 02/02/94]

1/24/94—79—Memorandum by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock in support of [78-1] motion in limine. cys. to panel. (ps) [Entry date 02/02/94]

1/25/94—80—Response by James B. Hunt, Dennis A. Wicker, Daniel T. Blue Jr., Rufus L. Edmisten, NC Board of Election, Edward J. High, Jean H. Nelson, Larry Leake, Dorothy Presser, June K. Youngblood to [77-1] motion to compel. cys. to panel. (ps) [Entry date 02/02/94]

2/2/94—81—Order granting in part, denying in part [77-1] motion to compel. Speaker Blue may be questioned about the subject newspaper articles to limited extent: 1) whether statements attributed to him were his statements; 2) whether the statements reflected his belief at the time he made them. signed by Britt, J. (EB Ref: CIV. O. B. #127, p. 46. cys. faxed & served to counsel. (ps) [Entry date 02/03/94]

2/3/94———Bench trial set at 10:00 3/28/94, Cpmn. #5, Seventh Floor, Raleigh, NC before Judges Senr, Voorhees & Phillips. cys. served. (ps)

2/3/94—82—Conditional motion by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McShane, Sim A. DeLagg Jr., Richard S. Sahlie, Jack Hawke for recusal of Judge Phillips. cys. to panel by counsel. (ps)

2/3/94—83—Memorandum by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McShane, Sim A. DeLagg Jr., Richard S. Sahlie, Jack Hawke in support of [82-1] motion for recusal of Judge Phillips. cys. to panel by counsel. (ps)

2/3/94—84—Motion by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McShane, Sim A. DeLagg Jr., Richard S. Sahlie, Jack Hawke for temporary restraining order, for preliminary injunction to extend the filing period for candidates to the US House of Rep.. cys. to panel by counsel. (ps)

2/3/94—85—Memorandum by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McShane, Sim A. DeLagg Jr., Richard S. Sahlie, Jack Hawke in support of [84-1] motion for temporary restraining order, [84-2] motion for preliminary injunction to extend the filing period for candidates to the US House of Rep. cys. to panel by counsel. (ps)

2/3/94—86—Motion by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McShane, Sim A. DeLagg Jr., Richard S. Sahlie, Jack Hawke for preliminary injunction to enjoin further election proceedings for the U. S. House of Rep. under the existing congressional redistricting plan. cys. to panel by counsel. (ps)

2/3/94—87—Memorandum by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McShane, Sim A. DeLagg Jr., Richard S. Sahlie, Jack Hawke in support of [86-1] motion for preliminary injunction to enjoin further election proceedings for the U. S. House of Rep. under the existing congressional redistricting plan. cys. to panel by counsel. (ps)

2/3/94—88—Motion by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McShane, Sim A. DeLagg Jr., Richard S. Sahlie, Jack Hawke to shorten time for responses & replies to the prel. inj. motion regarding further election proceedings. cys. to panel by counsel. (ps)

2/3/94——Deposition of Thomas Brooks Hofeller, Ph.D. taken on 12/8/93 & 12/9/93. (located in expandable w/loose exhibits). (js)

2/3/94——Deposition of Honorable Eva M. Clayton taken on 12/10/93. (js)

2/3/94——Deposition of John D. Merritt taken on 12/22/93. (js)

2/3/94——Deposition of Senator Dennis Jay Winner taken on 1/11/94. (js)

2/3/94——Deposition of Gerry F. Cohen taken on 3/4/92. (js)

2/3/94——Deposition of Gerry F. Cohen (TWO VOLUMES) - taken on 11/12/93 & 11/15/93. w/loose exhibits in expandable folder. (js)

2/3/94——Pltf. Intervenors' notebook of exhibits & deposition excerpts for the motions for preliminary injunction & tro. (js)

2/3/94——85—Response by James B. Hunt, Dennis A. Wicker, Daniel T. Blue Jr., Rufus L. Edmisten, NC Board of Election, Edward J. High, Jean H. Nelson, Larry Leake, Dorothy Presser, June K. Youngblood to [78-1] motion in limine. cys. to panel. (js) [Entry date 02/04/94]

2/3/94——86—Response by Ralph Gingles, Virginia Newell, George Simkins, N. A. Smith, Ron Leeper, Alfred Smallwood, Oscar Blanks, David Moore, Robert L. Davis, C. R. Ward, Jerry B. Adams, Jan Valder, Bernard Offerman, Jennifer McGovern, Charles Lambeth, Ellen Emerson, Lavonia Allison, George Knight, Leon Copeley, Woody Connette, Roberta Waddle, William M. Hodges to [78-1] motion in limine. cys. to panel. (js) [Entry date 02/04/94]

2/4/94——87—(CORRECTED) Response by Ralph Gingles, Virginia Newell, George Simkins, N. A. Smith, Ron

Leeper, Alfred Smallwood, Oscar Blanks, David Moore, Robert L. Davis, C. R. Ward, Jerry B. Adams, Jan Valder, Bernard Offerman, Jennifer McGovern, Charles Lambeth, Ellen Emerson, Lavonia Allison, George Knight, Copeley, Woody Connette, Robert Waddle, William M. Hodges to [78-1] motion in limine. cys. to panel. (js) [Entry date 02/06/94]

2/4/94—92—Response by James B. Hunt, Dennis A. Wicker, Daniel T. Blue Jr., Rufus L. Edmisten, NC Board of Election, Edward J. High, Jean H. Nelson, Larry Leake, Dorothy Presser, June K. Youngblood to [84-1] motion for temporary restraining order. cys. to panel. (js) [Entry date 02/06/94]

2/4/94—93—Affidavit of Johnnie F. McLean by James B. Hunt, Dennis A. Wicker, Daniel T. Blue Mr., Rufus L. Edmisten, NC Board of Election, Edward J. High, Jean H. Nelson, Larry Leake, Dorothy Presser, June K. Youngblood Re: [92-1] response to motion for TRO. cys. to panel. (js) [Entry date 02/06/94]

2/4/94—94—Certificate of service by James B. Hunt, Dennis A. Wicker, Daniel T. Blue Jr., Rufus L. Edmisten, NC Board of Election, Edward J. High, Jean H. Nelson, Larry Leake, Dorothy Presser, June K. Youngblood regarding affidavit & response to mot. for TRO. cys. to panel. (js) [Entry date 02/06/94]

2/4/94——Motion hearing re: [84-1] motion for temporary restraining order before Judges Phillips and Britt held on 2/4/94, Ctrm. #2, Seventh Floor, Raleigh, NC. Counsel present: Robinson Everett, Tom Farr, Craig Mills, Tom Ellis, Edwin Speas, Tiare Smiley, Adam Stein. Donna Tomawski, Ct. Rptr. Time: 1 hour. TAKEN UNDER ADVISEMENT. (js) [Entry date 02/06/94]

2/4/94—95—Order denying [84-1] motion for temporary restraining order signed by Britt, J. For The Court.

OB Ref: CIV. O. B. #127, p. 48. cys. served & counsel called. (js) [Entry date 02/06/94]

2/4/94——Withdrawal of [82-1] motion for recusal of Judge Phillips made by Tom Farr at the 2/4/94 hearing. (js) [Entry date 02/06/94]

2/7/94—96—Joinder in Motions for Preliminary Injunction and TRO by plaintiff Ruth O. Shaw, plaintiff Melvin G. Shimm, plaintiff Robinson O. Everett, plaintiff James M. Everett cys. to panel. (js) [Entry date 02/08/94]

2/7/94—97—Order granting [88-1] motion to shorten time for responses & replies to the prel. inj. motion regarding further election proceedings, Reply to Response to Motion reset to 2/10/94 for [78-1] motion in limine, Response to motion reset to 2/22/94 for [84-2] motion for preliminary injunction to extend the filing period for candidates to the US House of Rep., reset to 2/22/94 for [86-1] motion for preliminary injunction to enjoin further election proceedings for the U. S. House of Rep. under the existing congressional redistricting plan, Reply briefs for mot. for prelim. injunctions due 2/25/94. Motion hearing before Judge W. E. Britt set for 9:00 3/1/94 for [86-1] motion for preliminary injunction to enjoin further election proceedings for the U. S. House of Rep. under the existing congressional redistricting plan, set for 9:00 3/1/94 for [84-2] motion for preliminary injunction to extend the filing period for candidates to the US House of Rep. Ctrm. #2, Seventh Floor, Raleigh, NC. signed by Britt, J. OB Ref: CIV. O. B. #127, p. 55. cys. served. (js) [Entry date 02/08/94]

2/9/94—98—Stipulation of dismissal w/o prejudice as to pltf.-intervenor Richard Scott Sahlie. cys. to panel. (js)

2/11/94—99—Reply by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G.

Bullock to response to [78-1] motion in limine. cys. to panel. (js) [Entry date 02/16/94]

2/17/94——Transcript Filed - regarding hearing on Motions before Judges Phillips & Britt on 2/4/94 in Raleigh, NC. Court Reporter - Donna Tomawski (js) [Entry date 02/18/94]

2/22/94—100—Request for Judicial Notice of Census Data filed by intervenor-defendant Ralph Gingles, intervenor-defendant Virginia Newell, intervenor-defendant George Simkins, intervenor-defendant N. A. Smith, intervenor-defendant Ron Leeper, intervenor-defendant Smallwood, intervenor-defendant Oscar Blanks, intervenor-defendant David Moore, intervenor-defendant Robert L. Davis, intervenor-defendant C. R. Ward, intervenor-defendant Jerry B. Adams, intervenor-defendant Jan Valder, intervenor-defendant Bernard Offerman, intervenor-defendant Jennifer McGovern, Charles Lambeth, intervenor-defendant Ellen Emerson, intervenor-defendant Lavonia Allison, intervenor-defendant George Knight, intervenor-defendant Leto Copeley, intervenor-defendant Woody Connette, intervenor-defendant Roberta Waddle, intervenor-defendant William M. Hodges. cy. to panel. (js) [Entry date 01/25/94]

2/22/94—101—Response by Ralph Gingles, Virginia Newell, George Simkins, N. A. Smith, Ron Leeper, Alfred Smallwood, Oscar Blanks, David Moore, Robert L. Davis, C. R. Ward, Jerry B. Adams, Jan Valder, Bernard Offerman, Jennifer McGovern, Charles Lambeth, Ellen Emerson, Lavonia Allison, George Knight, Leto Copeley, Woody Connette, Roberta Waddle, William M. Hodges to [84-2] motion for preliminary injunction to extend the filing period for candidates to the US House of Rep., [86-1] motion for preliminary injunction to enjoin further election proceedings for the U. S. House of Rep.

under the existing congressional redistricting plan. cy. to panel. (js) [Entry date 02/25/94]

2/22/94—102—Memorandum by Ralph Gingles, Virginia Newell, George Simkins, N. A. Smith, Ron Leeper, Alfred Smallwood, Oscar Blanks, David Moore, Robert L. Davis, C. R. Ward, Jerry B. Adams, Jan Valder, Bernard Offerman, Jennifer McGovern, Charles Lambeth, Ellen Emerson, Lavonia Allison, George Knight, Leto Copeley, Woody Connette, Roberta Waddle, William M. Hodges in support of [101-1] response. EXHIBITS LOCATED IN EXPANDABLE FOLDER. (js) [Entry date 02/25/94]

2/22/94—103—Motion for Richard Rosenbaum to file amicus brief on behalf of the United States of America. cy. to panel. (js) [Entry date 02/25/94]

2/22/94—104—Motion by USA for leave to file amicus brief in excess of 30 pages. cys. to panel. (js) [Entry date 02/27/94]

2/22/94—105—Motion by James B. Hunt, Dennis A. Wicker, Daniel T. Blue Jr., Rufus L. Edmisten, NC Board of Election, Edward J. High, Jean H. Nelson, Larry Leake, Dorothy Presser, June K. Youngblood for leave to file response brief in excess of 30 pages. cy. to panel. (js) [Entry date 02/27/94]

2/23/94—106—Order granting [106-1] motion for leave to file response brief in excess of 30 pages signed by Britt, J. cys. served. (js) [entry date 02/27/94]

2/23/94—107—Response by James B. Hunt, Dennis A. Wicker, Daniel T. Blue Jr., Rufus L. Edmisten, NC Board of Election, Edward J. High, Jean H. Nelson, Larry Leake, Dorothy Presser, June K. Youngblood to [84-2] motion for preliminary injunction to extend the filing period for candidates to the US House of Rep., [86-1] motion for preliminary injunction to enjoin further election proceedings for the U. S.

House of Rep. under the existing congressional redistricting plan. LOCATED IN EXPANDABLE FOLDER. cys. to panel. (js) [Entry date 02/27/94]

2/25/94—108—Reply by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock, James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. DeLapp Jr., Jack Hawke to response to [84-2] motion for preliminary injunction to extend the filing period for candidates to the US House of Rep., [86-1] motion for preliminary injunction to enjoin further election proceedings for the U. S. House of Rep. under the existing congressional redistricting plan. cys. to panel. (js) [Entry date 02/27/94]

2/28/94—109—Response by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock in opposition to [100-1] Request for Judicial Notice. cys. to panel. (js) [Entry date 03/10/94]

2/28/94—110—Response by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock to [105-1] motion for Richard Rosenbaum to file amicus brief on behalf of the United States of America. cys. to panel. (js) [Entry date 03/10/94]

2/28/94—111—Memorandum by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock in support of [110-1] response to motion to file amicus brief. cys. to panel. (js) [Entry date 03/10/94]

3/1/94——Motion hearing re: [84-2] motion for preliminary injunction to extend the filing period for candidates to the US House of Rep. Motion hearing held. [86-1] motion for preliminary injunction to enjoin further election proceedings for the U. S. House of

Rep. under the existing congressional redistricting plan Motion hearing held before Judge W. E. Britt, Judge Phillips & Judge Voorhees on 3/1/94, Crm. #2, Seventh Floor, Raleigh, NC. Counsel present: Tom Farr, Michael Hess, Robinson Everett, Eddie Speas, Tiare Smiley, Anita Hodgkiss, Adam Stein, Dayna Cunningham. USA attorneys present: Janice Cole & Rudy Renfer. The motion to file amicus brief is allowed but USA will not be a party. Pltfs. & Pltf.-Int. have through 3/4/94 to file response to amicus brief. Status conference will be called to prepare for trial. (js) [Entry date 03/10/94]

3/1/94—112—Order granting [103-1] motion for Richard Rosenbaum to file amicus brief on behalf of the United States of America, granting [104-1] motion for leave to file amicus brief in excess of 30 pages. Denying the request for recusal of Judge Phillips. signed by Britt, J. OB Ref: CIV. O. B. #127, p. 114. cys. served. (js) [Entry date 03/10/94]

3/1/94—113—Amicus Curiae Brief by United States in opposition to motion for preliminary injunction. (js) [Entry date 03/10/94]

3/4/94—114—Response by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock in opposition to [113-1] amicus brief. cys. to panel. (js) [Entry date 03/10/94]

3/9/94—115—Order denying [86-1] motion for preliminary injunction to enjoin further election proceedings for the U. S. House of Rep. under the existing congressional redistricting plan, denying [84-2] motion for preliminary injunction to extend the filing period for candidates to the US House of Rep., denying [78-1] motion in limine, granting deft.-int. request to take judicial notice signed by Britt, J. for the court. OB Ref: CIV. O. B. #127, p. 126. cys. served. (js) [Entry date 03/10/94]

3/14/94—116—Order on Scheduling by Judge Britt regarding the remaining pre-trial and trial activities. (CIV. O. B. #127, p. 130) Trial to start on 3/28/94 at 9:00 a.m. cys. served. cys. to panel. (js) [Entry date 03/22/94]

3/16/94——Deposition of Mary L. Peeler taken on 12/21/93. (js) [Entry date 03/22/94]

3/16/94——Deposition of Ronald E. Weber, Ph.D. taken on 2/2/94. (js) [Entry date 03/22/94]

3/16/94——Deposition of Richard L. Engstrom, Ph.D. taken on 12/29/93. (js) [Entry date 03/22/94]

3/16/94——Deposition of Daniel T. Blue, Jr. taken on 1/12/94. (js) [Entry date 03/22/94]

3/16/94——Deposition of Frank Winston Ballance, Jr. taken on 1/14/94. (js) [Entry date 03/22/94]

3/16/94——Deposition of John D. Merritt taken on 12/22/93. (js) [Entry date 03/22/94]

3/16/94——Deposition of J. Morgan Lousser, Ph.D. taken on 1/10/94. (js) [Entry date 03/22/94]

3/16/94——Deposition of Henry M. Michaux, Jr. taken on 1/12/94. (js) [Entry date 03/22/94]

3/16/94——Deposition of Alfred W. Stuart, Ph.D. taken on 1/4/94. (js) [Entry date 03/22/94]

3/16/94——Deposition of Nancy M. Burnap, Ph.D. taken on 1/11/94. (js) [Entry date 03/22/94]

3/16/94——Deposition of Dennis Jay Winner taken on 1/11/94. (js) [Entry date 03/22/94]

3/16/94——Deposition of Thomas Brooks Hofeller, Ph.D. (TWO VOLUMES) - taken on 12/8/93. (js) [Entry date 03/22/94]

3/21/94—117—Trial Stipulation by Ralph Gingles, Virginia Newell, George Simkins, N. A. Smith, Ron Leeper, Alfred Smallwood, Oscar Blanks, David Moore,

Robert L. Davis, C. R. Ward, Jerry B. Adams, Jan Valder, Bernard Offerman, Jennifer McGovern, Charles Lambeth, Ellen Emerson, Lavonia Allison, George Knight, Leto Copeley, Woody Connette, Roberta Waddle, William M. Hodges. cys. to panel. (js) [Entry date 03/22/94]

3/21/94—118—Trial Stipulation by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock, James B. Hunt, Dennis A. Wicker, Daniel T. Blue Jr., Rufus L. Edmisten, NC Board of Election, Edward J. High, Jean H. Nelson, Larry Leake, Dorothy Presser, June K. Youngblood, James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. DeLapp Jr., Richard S. Sahlie, Jack Hawke. cys. to panel. (js) [Entry date 03/22/94]

3/21/94—119—Objection by Ralph Gingles, Virginia Newell, George Simkins, N. A. Smith, Ron Leeper, Alfred Smallwood, Oscar Blanks, David Moore, Robert L. Davis, C. R. Ward, Jerry B. Adams, Jan Valder, Bernard Offerman, Jennifer McGovern, Charles Lambeth, Ellen Emerson, Lavonia Allison, George Knight, Copeley, Woody Connette, Roberta Waddle, William M. Hodges to [116-1] Scheduling order. cys. to panel. (js) [Entry date 03/22/94]

3/22/94—120—Order granting [119-1] request from deft.-intv. Deft.-intv. may present testimony from one (1) fact witness, either Congressman Melvin Watt or Congresswoman Eva Clayton. signed by Britt, J. OB Ref: CIV. O. B. #128, p. 19. cys. faxed to counsel. cys. to panel. (js)

3/22/94———Deposition of Melvin Shimm taken on 10/27/93. (js)

3/22/94———Deposition of Robinson O. Everett taken on 10/28/93. (js)

3/22/94———Deposition of Ruth Agnes Olson Shaw taken on 10/27/93. (js)

3/22/94———Deposition of James Douglas McGregor Everett taken on 10/27 and 10/28/93. (js)

3/22/94———Deposition of N. Leo Daughtry taken on 1/14/94. (js)

3/23/94———Deposition of Lee Joseph Mortimer, Jr. taken on 11/29/93. (js)

3/23/94———Deposition of Sandra Grey Herring taken on 11/29/93. (js)

3/23/94———Deposition of Timothy G. O'Rourke, Ph.D. taken on 12/17/93. (js)

3/23/94———Deposition of Russell Jackson Hawke, Jr. taken on 12/1/93. (js)

3/23/94———Deposition of Dorothy Green Bullock taken on 10/28/93. (js)

3/23/94———Deposition of James Thrash taken on 11/29/93. (js)

3/23/94———Deposition of William R. Keech, Ph.D. taken on 12/16/93. (js)

3/23/94———Deposition of Alex W. Willingham, Ph.D. taken on 12/22/93. (js)

3/23/94———Deposition of Harry L. Watson, Ph.D. taken on 12/21/93. (js)

3/23/94———Deposition of James M. O'Reilly, Ph.D. taken on 12/20/93. (js)

3/23/94———Deposition of James Arthur Pope taken on 12/1/93. (js)

3/23/94———Deposition of David Reed Goldfield, Ph.D. taken on 12/28/93. (js)

3/23/94———Deposition of David Thomas Flaherty, Jr. taken on 1/13/94. (js)

3/23/94———Deposition of Eva M. Clayton taken on 12/10/93. (js)

3/24/94———Deposition of Milton Frederick Fitch, Jr. taken on 1/13/94. (js)

3/24/94———Deposition of Gerry F. Cohen taken on 11/12/93. (js)

3/24/94———Deposition of Gerry F. Cohen taken on 11/15/93. (js)

3/24/94———Deposition of Melvin L. Watt taken on 12/2/93. (js)

3/24/94———Deposition of Tiare Bowe Smiley taken on 11/5/93. (js)

3/24/94———Deposition of Glenn Newkirk taken on 12/20/93. (js)

3/24/94———Deposition of Leslie Jane Winner taken 11/4/93. (js)

3/24/94———Deposition of William R. Gilkeson taken 11/5/93. (js)

3/24/94———Deposition of John D. Merritt taken on 3/7/92. (js)

3/24/94———Deposition of Dr. Robert Weissberg taken on 12/10/93. (js)

3/24/94———Deposition of Gerry F. Cohen taken 3/4/92. (js)

3/24/94—121—Expert Witness Statements filed by intervenor-defendant Ralph Gingles, intervenor-defendant Virginia Newell, intervenor-defendant George Simkins, intervenor-defendant N. A. Smith, intervenor-defendant Ron Leeper, intervenor-defendant Smallwood, intervenor-defendant Oscar Blanks, intervenor-defendant David Moore, intervenor-defendant Robert L. Davis, intervenor-defendant C. R. Ward, intervenor-defendant Jerry B. Adams, intervenor-defendant Jan Valder, intervenor-defendant Bernard Offerman, intervenor-defendant Jennifer McGovern, Charles Lambeth, intervenor-defendant Ellen Emerson, intervenor-defendant Lavonia Allison, intervenor-defendant George Knight, intervenor-defendant Leto Copeley, intervenor-defendant Woody Connette, intervenor-defendant Roberta Waddle, intervenor-defendant William N. Hodges. cys. to panel. (js)

3/24/94———Deposition of Richard G. Niemi taken on 12/14/93. (js)

3/24/94———Deposition of Allan J. Lichtman, Ph.D. taken on 12/15/93. (js)

3/24/94—122—Trial brief by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. DeLapp Jr., Richard S. Sahlie, Jack Hawke re: burden of proof. cys. to panel. (js)

3/24/94—123—Trial brief by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rich Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. DeLapp Jr., Richard S. Sahlie, Jack Hawke re: relevance and applicability of section 2 of the voting rights act. cys. to panel. (js)

3/24/94—124—Trial brief by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. DeLapp Jr., Richard S. Sahlie, Jack Hawke re: admissibility of newspaper articles. cys. to panel. (js)

3/24/94—125—Motion by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. DeLapp Jr., Richard S. Sahlie, Jack Hawke in limine. cys. to panel. (js)

3/24/94—126—Motion by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat

Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. DeLapp Jr., Richard S. Sahlie, Jack Hawke in limine re: exclusion of evidence obtained by deft.-intv. through use of an ex parte subpoena to US Justice (exhibits 527, 528, 529, 530, 531). cys. to panel. (js)

3/24/94—127—Trial brief by James B. Hunt, Dennis A. Wicker, Daniel T. Blue Jr., Rufus L. Edmisten, NC Board of Election, Edward J. High, Jean H. Nelson, Larry Leake, Dorothy Presser, June K. Youngblood. cys. to panel. (js)

3/24/94—128—Designation of Discovery Materials filed by defendant James B. Hunt, defendant Dennis A. Wicker, defendant Daniel T. Blue Jr., defendant Rufus L. Edmisten, defendant NC Board of Election, defendant Edward J. High, defendant Jean H. Nelson, defendant Larry Leake, defendant Dorothy Presser, defendant June K. Youngblood. cys. to panel. (js)

3/24/94—129—Trial brief by Ralph Gingles, Virginia Newell, George Simkins, N. A. Smith, Ron Leeper, Alfred Smallwood, Oscar Blanks, David Moore, Robert L. Davis, C. R. Ward, Jerry B. Adams, Jan Valder, Bernard Offerman, Jennifer McGovern, Charles Lambeth, Ellen Emerson, Lavonia Allison, George Knight, Leto Copeley, Woody Connette, Roberta Waddle, William M. Hodges. cys. to panel. (js)

3/24/94—130—Fact Witness Statements filed by intervenor-defendant Ralph Gingles, intervenor-defendant Virginia Newell, intervenor-defendant George Simkins, intervenor-defendant N. A. Smith, intervenor-defendant Ron Leeper, intervenor-defendant Smallwood, intervenor-defendant Oscar Blanks, intervenor-defendant David Moore, intervenor-defendant Robert L. Davis, intervenor-defendant C.

R. Ward, intervenor-defendant Jerry B. Adams, intervenor-defendant Jan Valder, intervenor-defendant Bernard Offerman, intervenor-defendant Ellen Emerson, intervenor-defendant Lavonia Allison, intervenor-defendant George Knight, intervenor-defendant Leto Copeley, intervenor-defendant Woody Connette, intervenor-defendant Roberta Waddle, intervenor-defendant William M. Hodges cys. to panel. (js)

3/24/94—131—Exhibits to Stipulations to be offered by deft.-intv. filed by intervenor-defendant Ralph Gingles, intervenor-defendant Virginia Newell, intervenor-defendant George Simkins, intervenor-defendant N. A. Smith, intervenor-defendant Ron Leeper, intervenor-defendant Alfred Smallwood, intervenor-defendant Oscar Blanks, intervenor-defendant David Moore, intervenor-defendant Robert L. Davis, intervenor-defendant C. R. Ward, intervenor-defendant Jerry B. Adams, intervenor-defendant Jan Valder, intervenor-defendant Bernard Offerman, intervenor-defendant Jennifer McGovern, Charles Lambeth, intervenor-defendant Ellen Emerson, intervenor-defendant Lavonia Allison, intervenor-defendant George Knight, intervenor-defendant Leto Copeley, intervenor-defendant Woody Connette, intervenor-defendant Roberta Waddle, intervenor-defendant William M. Hodges. cys. to panel. (js)

3/24/94———Deposition of Stephan Thernstrom, Ph.D. taken on 1/7/94. (js)

3/24/94———Deposition of Douglas J. Amy, Ph.D. taken on 1/6/94. (js)

3/25/94—132—Pretrial order filed signed by all counsel. cys. to panel by counsel. (js)

3/25/94———Received Answer of Deft.-Intv. Gingles to pltfs.' 1st set of written interr. cys. to panel by atty. (js)

3/25/94—133—Response by James B. Hunt, Dennis A. Wicker, Daniel T. Blue Jr., Rufus L. Edmisten, NC Board of Election, Edward J. High, Jean H. Nelson, Larry Leake, Dorothy Presser, June K. Youngblood in opposition to admission of newspaper articles attached as exhibits to the stipulations by the parties. cys. to panel. (js)

3/25/94—134—Trial brief by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock w/attach. report of Sandra Grey Herring. cys. to panel. (js) [Entry date 03/27/94]

3/28/94—135—FILED IN OPEN COURT Affidavit of Andrew C. Wright (copy) in separate blue binder - newspaper articles. (js) [Entry date 03/29/94]

3/28/94—136—Certificate of service by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock re: Report of Sandra Grey Herring. (js) [Entry date 03/29/94]

3/28/94—137—FILED IN OPEN COURT - pltfs. responses to deft.-intv. first set of written interr. (copy) (js) [Entry date 03/29/94]

3/28/94—138—FILED IN OPEN COURT - pltfs.' responses to defts.' third set of written interr. (copy). (js) [Entry date 03/29/94]

3/29/94———Transcript Filed of 3-judge trial for Monday, March 28, 1994 (Judges Phillips, Britt, Voorhees) Court Reporter - Donna Tomawski (js)

3/30/94———Transcript Filed of trial held on 3/29/94 - before Judges Phillips, Britt & Voorhees. Court Reporter - Donna Tomawski (js)

3/30/94———Motion in open court by United States , for protective order regarding deft.-intv. trial exhibits #528, #529 & #530 (js) [Entry date 04/01/94]

3/30/94———Response by Ralph Gingles, Virginia Newell, George Simkins, N. A. Smith, Ron Leeper, Alfred

Smallwood, Oscar Blanks, David Moore, Robert L. Davis, C. R. Ward, Jerry B. Adams, Jan Valder, Bernard Offerman, Jennifer McGovern, Charles Lambeth, Ellen Emerson, Lavonia Allison, George Knight, Leto Copeley, Woody Connette, Roberta Waddle, William M. Hodges to [0-0] motion for protective order regarding deft.-intv. trial exhibits #528, #529 & #530. cys to panel. (js) [Entry date 04/01/94]

3/30/94—140—Order granting [0-0] motion for protective order regarding deft.-intv. trial exhibits #528, #529 & #530, signed by Phillips, Britt & Voorhees, cys. served. (js) [entry date 04/01/94] [Edit date 04/05/94]

3/31/94———Transcript Filed on Three Judge Panel Trial held on 3/30/94 - before Judges Phillips, Britt & Voorhees. Court Reporter - Donna Tomawski (js) [Entry date 04/01/94]

4/1/94———Transcript Filed for Three Judge Panel Trial held on 3/31/94 - before Judges Phillips, Britt & Voorhees. Court Reporter - Donna Tomawski (js)

4/4/94———Transcript Filed of Bench Trial on 4/1/94 - before Judges Phillips, Britt & Voorhees. Court Reporter - Donna Tomawski (js) [Entry date 04/05/94]

4/4/94—141—Motion for A. Leon Higginbothan, Jr. to file amicus brief on behalf of The Congressional Black Caucus. cys. to panel. (js) [entry date 04/05/94]

4/4/94—142—Motion for A. Leon Higginbotham, Jr. to appear pro hac vice. cys. to panel. (js) [Entry date 04/05/94]

4/4/94—143—Order denying [142-1] motion for A. Leon Higginbotham, Jr. to appear pro hac vice, denying [141-1] motion for A. Leon Higginbothan, Jr. to file amicus brief signed by Phillips, USCJ. OB Ref: CIV. O. B. #128, p. 50. cys. served. (js) [Entry date 04/05/94]

4/4/94———Bench trial held . Court Reporter: Donna Tomawski before Judge J. D. Phillips Jr., Judge W. E. Britt & Judge Richard L. Voorhees from 3/28/94 to 4/4/94. Counsel present: Michael Hess, Robinson Everett & Tom Farr for pltfs. & pltf.-intv. Edwin Speas, Tiare Smiley, Adam Stein, Anita Hodgkiss & Dayna Cunningham for defts. & deft.-intv. REMAINING SCHEDULE: Parties to file & deliver Findings of Fact & Conclusions of Law by 4/11/94; Parties to file & deliver Statement of Objections for Use by Court by 4/14/94. Court will reconvene on 4/18/94 at 9:00 am to hear final argument. Each party limited to 15 minutes. May hear evidentiary questions if court decides. Trial Time: 23 hours. (js) [entry date 04/05/94]

4/5/94———Transcript Filed re: Bench Trial held on 4/4/94 - before Judges Phillips, Britt & Voorhees. Court Reporter - Donna Tomawski (js)

4/6/94—144—SCHEDULING ORDER - 1) all counsel to provide clerk revised list of exhibits & update of objections to exhibits. 2) proposed findings of fact and conclusions of law due by 5:00 pm on 4/11/94. 3) statement of objections for use by court of any evidence in proposed findings of fact due 4/14/94. 4) additional briefs not exceeding 5 pages may be filed by 4/14/94. Hearing set for 9:00 am on 4/18/94, Ctrm. #2, Raleigh. signed by Britt, J. cys. to panel & counsel. (js)

4/11/94—145—PLAINTIFFS' Proposed Findings of Fact and Conclusions of Law by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett. Dorothy G. Bullock. cy. to panel. (js) [Entry date 04/17/94]

4/11/94—146—PLAINTIFF INTERVENORS' Proposed Findings of Fact and Conclusions of Law by James Arthur "Art" Pope, Betty S. Justice, Doris Lail,

Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. DeLapp Jr., Richard S. Sahlie, Jack Hawke. cy. to panel. (js) [Entry date 04/17/94]

4/11/94—147—DEFENDANTS' Proposed Findings of Fact and Conclusions of Law by James B. Hunt, Dennis A. Wicker, Daniel T. Blue Jr., Rufus L. Edmisten, NC Board of Election, Edward J. High, Jean H. Nelson, Larry Leake, Dorothy Presser, June K. Youngblood. cy. to panel. (js) [Entry date 04/17/94]

4/11/94—148—DEFT. INTERVENORS' Proposed Findings of Fact and Conclusions of Law by Ralph Gingles, Virginia Newell, George Simkins, N. A. Smith, Ron Leeper, Alfred Smallwood, Oscar Blanks, David Moore, Robert L. Davis, C. R. Ward, Jerry B. Adams, Jan Valder, Bernard Offerman, Jennifer McGovern, Charles Lambeth, Ellen Lavonia Allison, George Knight, Leto Copeley, Woody Connette, Roberta Waddle, William M. Hodges. cy. to panel. (LOCATED IN BLACK BINDER). (js) [Entry date 04/17/94]

4/11/94—149—Motion by United States for leave to file amicus brief in excess of 30 pages. cy. to panel. (js) [Entry date 04/17/94]

4/12/94—150—Motion by United States for leave to file amended post trial amicus brief. cy. to panel. (js) [Entry date 04/17/94]

4/13/94—151—Response by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock to [150-1] motion for leave to file amended post trial amicus brief, [149-1] motion for leave to file amicus brief in excess of 30 pages. cy. to panel. (js) [Entry date 04/17/94]

4/13/94—152—Memorandum by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock in support of [151-1] motion

response to USA's mot. to file amended AMICUS brief. cy. to panel. (js) [Entry date 04/17/94]

4/14/94—153—ERRATA to pltf.-intv.'s Proposed Findings of Facts (docket #146). cy. to panel (js) [Entry date 04/17/94]

4/14/94—154—ERRATA to defts.' Proposed Findings of Fact. (docket entry #147). cy. to panel. (js) [Entry date 04/17/94]

4/14/94—155—Defts.' Evidentiary Objection to Pltfs.' and Pltf.-Intv.'s Proposed Findings of Fact. cy. to panel. (js) [Entry date 04/17/94]

4/14/94—156—Deft.-Intvs.' Objection to Evidence Used by Opposing Parties. cy. to panel. (js) [Entry date 04/17/94]

4/14/94—157—Pltfs.' and Pltf.-Intvs.' Statement of Objections to Defts.' Proposed Findings of Fact and Exhibits. cy. to panel. (js) [Entry date 04/17/94]

4/14/94—158—Pltfs. and Pltf.-Intvs.' Statement of Objections to Deft.-Intvs.' Fact Witness Statements (exhibit 502), Stipulations, Proposed Findings of Fact & Exhibits. cy. to panel. (js) [Entry date 04/17/94]

4/14/94—159—Pltfs. and Pltf.-Intvs.' Statement of Evidentiary Objections to the Use of Defts.' and Deft.-Intvs.' Expert Textimony. cy. to panel. (js) [Entry date 04/17/94]

4/14/94—160—Post Trial brief by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock. cy. to panel. (js) [Entry date 04/17/94]

4/14/94—161—Pltf.-Intvs.' Reply Brief to Defts.' Proposed Findings of Fact. cy. to panel. (js) [Entry date 04/17/94]

4/15/94—162—Order granting in part, denying in part [150-1] motion for leave to file amended post trial

amicus brief, granting in part, denying in part [149-1] motion for leave to file amicus brief in excess of 30 pages. CLERK IS DIRECTED TO TO RETURN THE FIRST AMICUS BRIEF. THE CLERK IS DIRECTED TO RETURN PAGES 2 - 38 OF THE AMENDED AMICUS BRIEF & RETAINING PAGES 39 - 72 FOR FILING WITH THE COURT. signed by Britt, J. OB Ref: CIV. O. B. #128, p. 79, cys. faxed to panel & counsel. cy. to USA. (js) [Entry date 04/17/94]

4/15/94—163—Post Trial brief by United States (consisting of pages 39 - 72). cy. to panel. (js) [Entry date 04/17/94]

4/18/94—164—Motion by James B. Hunt, Dennis A. Wicker, Daniel T. Blue Jr., Rufus L. Emisten, NC Board of Election, Edward J. High, Jean H. Nelson, Larry Leake, Dorothy Presser, June K. Youngblood, Ralph Gingles, Virginia Newell, George Simkins, N. A. Smith, Ron Leeper, Alfred Smallwood, Oscar Blanks, David Moore, Robert L. Davis, C. R. Ward, Jerry B. Adams, Jan Valder, Bernard Offerman, Jennifer McGovern, Charles Lambeth, Ellen Emerson, Lavonia Allison, George Knight, Leto Copeley, Woody Connette, Roberta Waddle, William M. Hodges with memorandum in support to strike (1) Statement of Objections to Defts.' Proposed Finding of Facts and Exhibits; (2) Statement of Objections to Deft.-Intvs.' Fact Witness Statements, Stipulations and Proposed Findings of Fact and Exhibits; (3) Statement of Evidentiary Objections to the Use of Defts.' and Deft.-Intvs.' Expert Testimony; AND ALTERNATIVELY, Motion to Preclude Pltfs. and Pltf.-Intvs. from presenting Oral Final Argument. cys. to panel. (js) [Entry date 05/13/94]

4/22/94—165—Response by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock in opposition to [163-1] trial brief

by United States. cys. to panel. (js) [Entry date 05/13/94]

4/28/94———Transcript Filed - regarding hearing on Closing Arguments on 4/18/94, Ctrm. #2, Raleigh before Judges Phillips, Voorhees & Britt. Court Reporter - Jo Bush. cys. to panel. (js) [Entry date 05/13/94]

6/28/94—166—Subsequently Decided Authority - Louisiana v. Hayes (js) [Entry date 08/04/94]

7/1/94—167—Subsequently Decided Authority - Johnson v. de Grandy; Holder v. Hall (js) [Entry date 08/04/94]

7/25/94—168—Subsequently Decided Authority - BD. OF EDUC. v. GRUMET (js) [Entry date 08/04/94]

7/27/94—169—Subsequently Decided Authority - HAYS v. LOUISIANA (js) [Entry date 08/04/94]

8/1/94—172—Judgment for James B. Hunt, Dennis A. Wicker, Daniel T. Blue Jr., Rufus L. Edmisten, NC Board of Election, Edward J. High, Jean H. Nelson, Larry Leake, Dorothy Presser, June K. Youngblood, Ralph Gingles, Virginia Newell, George Simkins, N. A. Smith, Ron Leeper, Alfred Smallwood, Oscar Blanks, David Moore, Robert L. Davis, C. R. Ward, Jerry B. Adams, Jan Valder, Bernard Offerman, Jennifer McGovern, Charles Lambeth, Ellen Emerson, Lavonia Allison, George Knight, Leto Copeley, Woody Connette, Roberta Waddle, William M. Hodges against Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock, James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. DeLapp Jr., Richard S. Sahlie, Jack Hawke. The challenged congressional redistricting plan does not

violate any rights of the pltfs. or their supporting intervenors. signed by Skinner, deputy clerk. CIV. O. B. #130, p. 87. cys. served. (js) [Edit date 08/04/94]

8/1/94—170—Findings of fact and conclusions of law signed by Phillips, Senior Circuit Judge; Britt, District Judge, EDNC; Voorhees, Chief District Judge, WDNC - concurring in part, dissenting in part. THE CHALLENGED REDISTRICTING PLAN DOES NOT VIOLATE ANY RIGHTS OF THE PLTFS. OR PLTF.-INTERVENORS. OB Ref: CIV. O. B. #130, p. 85. cys. served. THE JUDGES RESERVE THE RIGHT TO REVISE THEIR RESPECTIVE OPINIONS BY 8/21/94. (LOCATED IN SEPARATE EXPANDABLE FOLDER) (js) [Entry date 08/04/94]

8/1/94—171—Order - the majority judges and the dissenting judge reserve the right to revise their respective opinions by 8/21/94. signed by Phillips, Senior Circuit Judge. OB Ref: CIV. O. B. #130, p. 86. cys. served. (js) [Entry date 08/04/94]

8/1/94———Case closed - PERMANENT (js) [Entry date 08/16/94]

8/15/94—173—Motion by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock to amend [170-1] findings of fact order. cys. to panel. (js) [Entry date 08/16/94] [Edit date 08/16/94]

8/18/94—174—Notice of appeal by James Arthur "Art" Pope, Betty S. Justice, Doris Lail, Joyce Lawing, Nat Swanson, Rick Woodruff, J. Ralph Hixon, Audrey McBane, Sim A. Delapp,Jr and Jack Hawke to the Supreme Court of the United States. Appeal record due on 9/27/94 - lc Supreme Court with copy of Opinion, lc Three Judge Panel, U.S. Atty. and Counsel of Record. (ms) [Entry date 08/19/94]

8/22/94—175—Amended findings of fact and conclusions of law OB Ref: CIV. O.B. #131, p. 48. cys. served. (js) [Entry date 08/28/94]

8/29/94—176—Notice of appeal to Supreme Court by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett. Dorothy G. Bullock -Check in the Amount of $300.00, check # 4467 to Supreme Court, lc Counsel of Record, 1c Three Judge Panel. (ms)

9/1/94—177—Order denying [173-1] motion to amend [170-1] findings of fact order. Chief Judge Voorhees, dissenting. signed by Judge Britt. OB Ref: CV OB # 131, p. 63 cys to Counsel of Record. (ms) [Entry date 09/06/94]

9/15/94—178—Subsequent Notice of appeal by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock re: [174-1] appeal by Rick Woodruff, Nat Swanson, Joyce Lawing, Doris Lail, Betty S. Justice, James Arthur "Art" Pope (ms)

9/16/94—179—Three-Judge court- Notice of appeal to the Supreme Court of the United States by counsel (Thomas F. Ellis) for plaintiff-intervenors. (ag) [Entry date 09/20/94] [Edit date 09/20/94]

9/21/94—180—Subsequent Notice of appeal by Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, Dorothy G. Bullock re: [178-1] modifier appeal by Dorothy G. Bullock, James M. Everett, Robinson O. Everett, Melvin G. Shimm, Ruth O. Shaw. No copy to Supreme Court by District Court. (ag) [Entry date 09/26/94]

10/21/94—181—Order - The time for filing a jurisdictional statement in the above entitled case, be and the same is hereby extended to and including November 21, 1994.signed by William Rehnquist, Chief Justice of the United States. (ms) [Entry date 10/24/94]

RELEVANT PLEADINGS

STIPULATIONS BY THE PARTIES

* * * *

II. The General Assembly

10. The North Carolina General Assembly consists of the Senate and the House of Representatives. N.C. Const. Art. II, § 1.

11. The North Carolina Senate has 50 members. In 1990, 50 Senators were elected from 35 districts for two-year terms. N.C. Const. Art. II, §§ 2, 3, and 9; former N.C. Gen. Stat. § 120-1 (amended effective January 14, 1992). The terms of the 50 members elected in 1990 commenced on January 1, 1991.

12. Of the 50 members of the 1991 Senate, 36 were Democrats and 14 were Republicans, and 45 were white and 5 were black. The occupations of the members of the 1991 Senate included attorney, realtor, banker, educator, physician, insurance, retail merchant, farmer, retired US Postmaster, and restaurateur. A listing of all 1991 Senators by political party and occupation is attached as Exhibit 1.

13. At the time of redistricting in 1981 and 1982, there was one black serving in the Senate. There was also one black serving in the Senate in 1983. Three blacks served in the Senate in 1985; 2 served in 1987; and 5 served in 1989. At the time of redistricting in 1991 and 1992, there were 5 blacks serving in the Senate. Since the 1992 elections, 7 blacks have served in the Senate. Five of these Senators were elected from single-member majority black districts, while Senator Howard N. Lee from Orange County was elected from a two-member majority white district, and Senator Ralph A. Hunt from Durham County was also elected from a two-member majority white district. The names of the black Senators serving since 1981 are contained in Exhibit 2.

14. In 1991 and 1992, Lieutenant Governor James C. Gardner, a white male Republican, was President of the Senate; Henson P. Barnes, a white male Democrat was President Pro Tempore; and Kenneth Royall, also a white male Democrat, was Deputy President Pro Tempore.

15. The North Carolina House of Representatives has 120 members. In 1990, 120 Representatives were elected from 72 districts for two-year terms. N.C. Const. Art. II, §§ 4, 5, and 9; former N.C. Gen. Stat. § 120-2 (amended effective January 14, 1992). The terms of the members elected in 1990 commenced on January 1, 1991.

16. Of the 120 members of the 1991 House, 81 were Democrats and 39 were Republicans, and 105 were white, 14 were black, and 1 was a Native American. The occupations of the members of the 1991 House included attorney, dentist, physician, engineer, accountant, college professor, public school teacher, musician, businessperson, and homemaker. A listing of all 1991 representatives by political party and occupation is attached as Exhibit 3.

17. In 1991 and 1992, Daniel T. Blue, Jr., an African-American male Democrat, was speaker of the House and Marie W. Colton, a white female Democrat, was Speaker Pro Tempore. Speaker Blue remains the Speaker of the House at this time. Representative Blue is the fourth black since Reconstruction to serve as Speaker of a State House. His three predecessors were: Willie Brown, Jr. (California, 1980; K. Leroy Irvis (Pennsylvania, 1977 and 1982); and S. Howard Woodson (New Jersey, 1974).

18. At the time of redistricting in 1981 and 1982, there were 3 blacks serving in the House. After the 1982 redistricting, 11 blacks served in the House in 1983. Thirteen blacks served in the House in 1985 and in 1987; and 14 served in 1989. At the time of redistricting in 1991 and 1992, there were 14 blacks serving in the House. Since

the 1992 elections, 18 blacks have served in the House. Representative H. M. Michaux, Jr., an African-American male, was elected in a multi-member majority white district in Durham County. The other 17 black representatives were elected from single-member majority black districts. The names of the black Representatives serving since 1981 are contained in Exhibit 4.

III. The General Assembly's Redistricting Activities

19. According to the 1980 Decennial Census, North Carolina's population was 5,881,760. According to the 1990 federal decennial census, North Carolina's population had increased to 6,628,637. This increase in population (746,877 persons) entitled North Carolina to an additional seat in the United State House of Representatives, increasing the size of the delegation from 11 to 12.

20. The State of North Carolina has no express constitutional or statutory provisions addressing congressional redistricting. The Constitution of North Carolina requires that its House and Senate districts be as nearly equal in population as possible and consist of contiguous territory. N.C. Const. Art. II, §§ 3 and 5. In 1968, the State Constitution was amended to provide that no county shall be divided in the formation of House and Senate districts. This amendment was readopted in 1970. However, these amendments never received pre-clearance and were objected to by the United States Attorney General in 1981, pursuant to § 5 of the Voting Rights Act.

• • • •

22. Forty of North Carolina's 100 counties are "covered jurisdictions" for purposes of Section 5 preclearance under the Voting Rights Act, 42 U.S.C. § 1973(c). A map and a list of these 40 counties is attached as Exhibit 5.

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IV. Development and Enactment of the First Congressional Redistricting Plan

24. Redistricting committees were appointed by the President Pro Tem of the Senate and the Speaker of the House to facilitate completion of the General Assembly's redistricting responsibilities.

25. In the Senate, a single Redistricting Committee was established on February 4, 1991, with separate subcommittees established for Legislative redistricting and Congressional redistricting. The full Redistricting Committee had 26 members, of whom 19 were Democrats and 7 were Republicans, and 23 were white and 3 were black. The Congressional Redistricting Subcommittee had 13 members, of whom 9 were Democrats and 4 were Republicans, and 12 were white and 1 was black. A list of the Redistricting Committee and Congressional Redistricting Subcommittee members is attached as Exhibit 6.

26. Sen. Dennis J. Winner, a white male Democrat, was Chairman of the Senate Redistricting Committee and Sen. Austin M. Allran, a white male Republican, was ranking minority member. Sen. Russell G. Walker, a white male Democrat, was Chairman of the Senate Congressional Redistricting Subcommittee, and Sen. William W. Staton, also a white male Democrat, was Vice-Chairman.

27. In the House, two separate redistricting committees were established on March 7, 1991, the Legislative and Local Redistricting Committee and the Congressional Redistricting Committee. The members of these committees were chosen by Speaker Blue, an African-American male Democrat. The Congressional Redistricting Committee had 28 members of whom 19 were Democrats, 8 were Republicans and 1 was Independent, and 22 were white and 6 were black.

28. The co-chairmen of the House Congressional Redistricting Committee were Rep. Milton F. Fitch, Jr., an

African-American male Democrat, Rep. Edward C. Bowen, a white male Democrat, and Rep. R. Samuel Hunt, III, a white male Democrat. The Vice-Chairmen were Rep. Karen E. Gottovi, a white female Democrat, Rep. H. M. Michaux, Jr., an African-American male Democrat, Rep. David E. Redwine, a white male Democrat, and Reps. David T. Flaherty and Larry T. Justus, white male Republicans. A list of the members of the Congressional Redistricting Committee is attached as Exhibit 7.

29. The General Assembly used a redistricting computer software program in preparing and analyzing redistricting plans. The software package purchased by the General Assembly was "Plan 90" by Public Systems Associates.

30. One type of information loaded in the redistricting computer was geographic information contained in TIGER digital map files provided by the U.S. Bureau of the Census. The TIGER files contain digital data describing geographic features, including basic map features, highways, streets, rivers, railroads and political boundaries, which allow a visual display of the geographic features on a computer screen.

31. On February 18, 1991, the General Assembly received the 1990 Census P.L. 94-171 tapes from the U.S. Department of Commerce. The P.L. 94-171 tapes provide census data at the census block level on total population and voting age population by race or national origin and on housing density. In addition, for 48 counties this data is also provided at the precinct level. Precinct level data for 21 additional counties was added to the redistricting system's database by the General Assembly's staff.

32. Voter registration data by race and party as of November, 1990, was also merged with the redistricting system's database.

33. Also loaded in the computer database were election results by precinct for these statewide general elections: (1) the 1990 election between Jesse Helms (R) and Harvey Gantt (D) for United States Senate; (2) the 1988 election between James Gardner (R) and Tony Rand (D) for Lt. Governor; and (3) the 1988 election between Donald Smith (R) and John Lewis (D) for the Court of Appeals.

34. The redistricting computer database did not contain any demographic information concerning income, education, type of employment, health care data, commuter patterns, or any other type of economic, sociological or historical data.

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39. The Senate Redistricting Committee conducted its hearings between March 1 and March 18, 1991, at Elizabeth City, Greensboro, Asheville, Charlotte, Wilmington and Wilson.

40. Approximately 80 persons attended the Elizabeth City hearing and presentations were made by 11 speakers. Approximately 30 persons attended the Greensboro hearing and presentations were made by 9 speakers. Approximately 50 persons attended the Charlotte hearing and presentations were made by 9 speakers. Approximately 50 persons attended the Asheville hearing and presentations were made by 11 speakers. Approximately 80 persons attended the Wilmington hearing and presentations were made by 15 speakers. Approximately 40 persons attended the Wilson hearing and presentations were made by 11 speakers. Copies of the transcripts for these hearings are located at C-28F-3(a)-(g) and included in Exhibit 200.

41. The House Redistricting Committees conducted hearings between March 21 and April 2, 1991 in Asheville, Gastonia, Statesville, Chapel Hill, Williamston,

Fayetteville, Rocky Mount, Jacksonville and Winston-Salem.

42. Approximately 27 persons attended the Jacksonville hearing and presentations were made by 5 speakers. Approximately 30 persons attended the Rocky Mount hearing and presentations were made by 9 speakers. Approximately 20 persons attended the Winston-Salem hearing and presentations were made by 9 speakers. Approximately 26 persons attended the Fayetteville hearing and presentations were made by 15 speakers. At the Chapel Hill hearing presentations were made by 5 speakers. At the Williamston hearing 13 persons spoke. At the Gastonia hearing presentations were made by 14 speakers. At the Statesville hearing 10 speakers made presentations or presented statements. Approximately 34 persons attended the Asheville hearing and presentations were made by 13 speakers. Copies of the transcripts of these hearings are located at 28F-3(a)(l) and included in Exhibit 200.

43. On April 17, 1991, the Senate Congressional Redistricting Subcommittee and House Congressional Redistricting Committee met jointly and adopted the following criteria to guide the Committees in developing congressional districts:

> The Committees responsible for redistricting the twelve congressional seats assigned to North Carolina, assisted by the legislative staff, retained counsel and the North Carolina Attorney General, shall be guided by the following standards in the development of the congressional districts:
>
> (a) In accordance with the requirements of the Article I, Section 2 of the United States Constitution, congressional districts shall be drawn so as to be as nearly equal in population as practicable—the ideal district population being 552,386.

(b) In accordance with the Voting Rights Act of 1965, as amended, and the 14th and 15th Amendments to the United States Constitution, the voting rights of racial minorities shall not be abridged or denied in the formation of congressional districts.

(c) All congressional districts shall be single member districts, as required by 2 U.S.C. § 2c, and shall consist of contiguous territory.

(d) It is desirable to retain the integrity of precincts. For the purpose of this criterion, precincts shall mean only the voting tabulating districts as demarcated in the General Assembly's automated redistricting system database as of May 1, 1991. This criterion does not apply to counties where voting tabulating districts are not demarcated in the General Assembly's automated redistricting system database on that date.

(e) Census blocks shall not be divided except to the extent that they were divided in the automated redistricting system database for precinct boundaries or to show previous districts.

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45. On June 13, 1991, the Senate and House congressional redistricting committees jointly conducted a public hearing in Raleigh at the Legislative Building regarding 1991 CONGRESSIONAL BASE PLANS #1 and #2. Twenty-seven persons made presentations. A copy of the transcript of this hearing is located at C-27R-2 and is included in Exhibit 200. Maps of CONGRESSIONAL BASE PLANS #1 and #2, along with election reports and other data, are included in Exhibit 10.

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47. On May 29, 1991, the first congressional redistricting plan was presented at a joint meeting of the Senate Congressional Redistricting Subcommittee and House

Congressional Redistricting Committee by the chairmen of those committees. This plan was denominated 1991 CONGRESSIONAL BASE PLAN #1 and contained one majority black district, the First District. On that same date, the Senate subcommittee voted to adopt that plan for purposes of presenting it to a noticed public hearing scheduled for June 13, 1991. A copy of BASE PLAN #1 is located at C-27H-7A (maps) and C-27H-7B (statistics); both maps and statistics are included in Exhibit 10.

48. The House redistricting co-chairmen prepared another Congressional plan denominated as 1991 CONGRESSIONAL BASE PLAN #2, which contained a similar majority black First District and was presented to the House Congressional Redistricting Committee on June 3, 1991.

49. At the June 3 meeting, Representative David Balmer, a white male Republican from Charlotte, presented an alternative plan, BALMER CONGRESS 6.2, which contained two majority-minority districts, of which one was also majority black. A copy of BALMER 6.2 is located at C-27R-4, and is included in Exhibit 10.

50. On June 4, 1991, the House Congressional Redistricting Committee adopted BASE PLAN #2 for presentation at the June 13, 1991, public hearing. A copy of BASE PLAN #2 is located at C-27H-8 and included in Exhibit 10.

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52. On June 18, 1991, the Senate chairs presented 1991 CONGRESSIONAL BASE PLAN #3 to the Senate Redistricting Committee, which adopted it and sent it to the Senate floor as Senate Bill 16. CONGRESSIONAL BASE PLAN #3 also contained a single majority black First District. On June 20, 1991, a motion, which failed 18 to 31, was made to postpone the plan. Subsequently, that plan passed second reading in the Senate by a vote of 30 to 19. Directly following the passage on second reading,

BASE PLAN #3 passed third reading by a voice vote. Exhibit 11 shows the votes by race and party. The plan was sent to the House and referred to the House Congressional Redistricting Committee. A copy of BASE PLAN #3 is located at C-27H-9 and included in Exhibit 10.

53. On June 20, 1991, the House co-chairmen presented 1991 CONGRESSIONAL BASE PLAN #4 to the House Congressional Redistricting Committee. This plan also contained a single majority black district—the First District. On June 21, 1991, the committee adopted BASE PLAN #4 as a committee substitute for Senate Bill 16. The vote in committee on the plan was 16 for and 7 against. Exhibit 12 shows the votes by race and party. A copy of BASE PLAN #4 is located at C-27H-10 and included in Exhibit 10.

54. At its June 21, 1991, meeting, the House Congressional Redistricting Committee also rejected two plans presented by white Republican committee members Reps. Balmer and Justus. BALMER CONGRESSIONAL-BLOCK LEVEL (a refinement of BALMER 6.2) failed by a vote of 5 to 16. Rep. Justus' plan, which contained one majority black district, was rejected by a vote of 7 to 16. No black legislators or Democrats voted for either of these plans. Exhibit 13 shows these committee votes by race and party. Copies of BALMER CONGRESSIONAL-BLOCK LEVEL and REP. JUSTUS'S CONGRESSIONAL PLAN are included in Exhibit 10.

55. On June 25, 1991, CONGRESSIONAL BASE PLAN #4 passed second reading in the House by a vote of 74 to 33. That same day the House rejected amendments by Reps. Balmer and Justus substituting their plans for BASE PLAN #4. All black representatives present and 68 of 72 Democrats voted for BASE PLAN #4 and against the two Republican amendments. Exhibit 14 shows the roll call votes by race and party. On June 26, 1991, CONGRESSIONAL BASE PLAN #4 passed third reading in

the House by a vote of 80 to 29 and was sent to the Senate. Exhibit 15 shows the roll call vote by race and party.

56. On June 27, 1991, the Senate failed to concur in the House Committee substitute for Senate Bill 16 and rejected CONGRESSIONAL BASE PLAN #4 by a vote of 5 to 39. Exhibit 16 shows the Senate roll call vote by race and party.

57. On June 28, 1991, President Pro Tempore Barnes appointed Senators Winner, Walker, Johnson, Ballance, Cooper and Cochran as the Senate's conferees. Senator Ballance is an African-American and Senator Cochran is a Republican; all the other conferees were white Democrats. On July 2, 1991, House Speaker Blue appointed Representatives Fitch, Bowen, Hunt, Barnes and Buchanan as the House conferees. Rep. Fitch is an African-American and Rep. Buchanan is a white Republican; all other conferees were white Democrats.

58. On July 3, 1991, the Senate and House redistricting chairs presented 1991 CONGRESSIONAL BASE PLAN #5 to the conference committee. A copy of that plan is located at C-27H-14 and included in Exhibit 10. The plan contains a single majority black district, the First District. After making adjustments involving only Stokes and Rockingham Counties, the conference committee approved 1991 CONGRESSIONAL BASE PLAN #6. A copy of BASE PLAN #6 is located at C-27A-2A and 2B and included in Exhibit 10.

59. On July 4, 1991, the Senate approved BASE PLAN #6 by a vote of 29 to 15, with all black Senators and 29 of 33 Democrats present voting in favor of the plan. Exhibit 17 shows the roll call vote by race and party.

60. On July 8, 1991, the House approved BASE PLAN #6 by a vote of 72 to 35. No black representatives and 5 of 72 Democrats voted against BASE PLAN #6. Exhibit 18 shows the vote by race and party.

61. Before the vote on BASE PLAN #6, Rep. Balmer moved the House to suspend its rules to allow consideration of a plan BALMER CONGRESS 7.8, which had been filed as House Bill 1310 that day. BALMER CONGRESS 7.8 contained two majority black districts. Rep. Balmer's motion was defeated by a vote of 39 to 63, with no blacks and 3 of 66 Democrats supporting it. Exhibit 18 shows the roll call vote on BALMER 7.8 by race and party. A copy of BALMER 7.8 is located at C-27R-6 and included in Exhibit 10.

62. Various civil rights groups supported the creation of a second majority-black or majority-minority congressional district during the passage at Chapter 601. However, during Chapter 601's amendment process, no black legislator ever voted for any plan containing more than one majority-black or majority-minority district on the floor of the House or Senate. Authentic copies of newspaper articles discussing this issue are attached as Exhibit 19.

63. On July 9, 1991, CONGRESSIONAL BASE PLAN #6, Senate Bill 16, was ratified by the General Assembly as Chapter 601 of the 1991 Session Laws. This plan contains a single majority black district, the First District. A copy of the plan enacted as Chapter 601, along with its statistical report, is included in Exhibit 10. Copies of the transcripts of the House and Senate proceedings and debates and House and Senate floor debates leading to the enactment of Chapter 601 are included in Exhibit 200.

64. North Carolina submitted its State House redistricting plan to the U.S. Department of Justice for preclearance on August 26, 1991. Chapter 601, the Congressional plan, was submitted on September 28, 1991. The State Senate redistricting plan was submitted on October 3, 1991. The Congressional submission consisted of six notebooks, various large scale maps and computer tapes. That submission was supplemented by the submission of

additional materials at the request of the Department of Justice throughout October, November and December. The preclearance submissions include a legislative history of the redistricting process.

* * * *

66. On August 5, 1991, Rep. David Balmer, a white Republican, wrote John R. Dunne, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, regarding Chapter 601. Rep. Balmer enclosed with his letter three plans he had drawn, BALMER CONGRESS 6.2., BALMER CONGRESS 7.8, AND BALMER CONGRESS 8.1. Rep. Balmer had introduced plans 6.2 and 7.8 in the General Assembly. BALMER 8.1 was not drawn until after Chapter 601 was enacted. Rep. Balmer wrote the Department of Justice a nine-page letter on September 27, 1991. Copies of these letters are attached as Exhibits 22 and 23.

67. The parties stipulate to the authenticity of the document attached as Exhibit 25 which is a memorandum to the United States Department of Justice written by Gerry F. Cohen, Legislative Services Director for the North Carolina General Assembly, on behalf of Representative Toby Fitch, Senator Dennis Winner, and House Speaker Daniel T. Blue, Jr. Mr. Cohen prepared this memorandum in response to criticisms of Chapter 601 leveled by the ACLU and other groups as part of the preclearance process. Other comments by the State submitted during the preclearance process for Chapter 601 are found at C-27R and attached as Exhibit 26.

68. An authentic copy of a memo prepared by Gerry Cohen, located at G2-1 of the supplemental submissions to the United States Department of Justice, is attached as Exhibit 24.

69. On October 3, 1991, a delegation of Republican legislators flew to Washington, D.C., accompanied by their legal counsel, Robert Hunter, to meet with U.S.

Department of Justice officials and to object to the state's House, Senate and Congressional redistricting plans. The Representatives who met with staff members of the Voting Section of the Civil Rights Division were Rep. Art Pope, the Republican Joint Caucus Leader; Sen. Robert Shaw, Senate Minority Leader; Sen. Leo Daughtry and Rep. David Balmer. Rep. Pope met with Justice Department staff to object to the House plan; Senators Shaw and Daughtry met with Justice Department staff to object to the Senate plan; and Rep. Balmer met with Justice Department staff to object to the Congressional plan.

70. Democratic state legislators and their legal counsel made two trips to Washington, D.C., for the purpose of supporting preclearance of the enacted plan contained in Chapter 601. On September 30, 1991, Speaker of the House Dan Blue, Sen. Dennis Winner and Rep. Toby Fitch met with staff attorneys in the Voting Section of the Civil Rights Division responsible for reviewing the state's preclearance submission. Counsel accompanying these legislators were Leslie J. Winner, Gerry F. Cohen and Tiare B. Smiley, Special Deputy Attorney General, Special Litigation Division. The legislators expressed their support for Chapter 601.

71. On December 17, 1991, Speaker Blue, Sen. D. Winner, Rep. Fitch, L. Winner and G. Cohen returned to Washington, D.C. to meet with John Dunne, the Assistant Attorney General of the United States for Civil Rights, and staff attorneys responsible for reviewing the state's plans. The meeting was requested by Mr. Dunne. The main thrust of the discussion regarding the state's Congressional plan was why the state had not adopted a congressional redistricting plan with two majority black districts.

72. The next day, December 18, 1991, the U.S. Department of Justice by letter denied preclearance to Chapter 601, the Congressional plan, as well as to the

Senate and House redistricting plans. An authentic copy of the letter interposing an objection to the plans is attached as Exhibit 27.

73. The Department of Justice's decision was widely criticized by Democratic legislators and Democratic Congressmen. Authentic copies of letters written by Congressmen Lancaster, Neal, Valentine, Price and Hefner to Senate President Pro Tem Barnes and House Speaker Blue criticizing the Department of Justice's decision and urging that the General Assembly appeal that decision are attached as Exhibit 20. Authentic copies of newspaper articles published during this period are attached as Exhibit 198. Some Republican legislators and Republican Congressmen urged the creation of two majority-minority districts and that the Department of Justice decision not be appealed. See transcript of January 8, 1992 public hearing, contained in Exhibit 200 at pp. 594-96.

V. Development and Enactment of the Second Congressional Redistricting Plan

74. On December 20, 1991, Governor James G. Martin issued a proclamation calling for a special session of the General Assembly to revise the state's redistricting plans and to postpone the filing period for candidates established by statute, N.C. Gen. Stat. § 163-101.

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78. Authentic copies of newspaper articles published in late December, 1991, and early January, 1992, containing statements by House Speaker Blue, an African-American male Democrat, are attached as Exhibit 29.

79. Authentic copies of newspaper articles published in late December, 1991, and January, 1992, containing statements by House Congressional Redistricting co-chair Toby Fitch, an African-American male Democrat, are attached as Exhibit 30.

80. Authentic copies of newspaper articles published in late December, 1991, and January, 1992, containing statements by Representative Mickey Michaux, an African-American male Democrat, are attached as Exhibit 31.

81. The General Assembly convened on December 30, 1991[.]

* * * *

83. After announcing a public hearing regarding the congressional redistricting plan to be held at 3:00 p.m. on January 8, 1992, and the schedule of redistricting meetings for the congressional redistricting committees, the General Assembly adjourned until January 13, 1992.

84. A public hearing was conducted by the House and Senate Committees in the Legislative Building on January 8, 1992. A transcript of this hearing is located at 2C-28F-2. A copy of this transcript is included in Exhibit 200.

85. At the January 8 hearing, Mary Peeler, Executive Director of the North Carolina NAACP, presented an alternative plan on behalf of the NAACP. This plan was developed in December, 1991 at the request of Rep. Thomas Hardaway, an African-American Democrat, and was known as OPTIMUM II-ZERO. A copy of OPTIMUM II-ZERO is included in Exhibit 10. Rep. Hardaway's plan was developed from CONGRESSIONAL BALMER 8.1. Rep. Hardaway provided the plan to John Merritt, an aide to Congressman Rose. Mr. Merritt made modifications to this plan with assistance from the National Committee for an Effective Congress and the advice of Democratic Congressmen. The NCEC's data base included results of Congressional elections. This data was not included in the State's computer data base. Mr. Merritt believed that this plan would satisfy the Department of Justice's objections to Chapter 601 and protect Congressman Rose's district by creating a second majority-minority district roughly along I-85, well to the west of

Congressman Rose's district. In January, 1992, Merritt shared the plan with the North Carolina NAACP, which decided to present the plan at the public hearing.

* * * *

89. On the weekend of January 18-19, 1992, the Democratic leadership of the House Congressional Redistricting Committee released 1992 CONGRESSIONAL BASE PLAN #7 and the Democratic leadership of the Senate Congressional Redistricting Subcommittee released 1992 CONGRESSIONAL BASE PLAN #8. Both plans were variations of the plan presented by Mary Peeler at the January 8, 1992, public hearing, featuring two majority black districts. Copies of these plans are located at 2C/27H-2 and 3 and included in Exhibit 10.

90. On January 21 and 22, 1992, the House Congressional Redistricting Committee met to discuss BASE PLAN #7. The Committee also discussed Rep. Justus' plan and received a plan from Rep. Flaherty, a member of the Committee, called REP. FLAHERTY'S CONGRESS PLAN, which contained two majority black districts and what he described as a minority-influence district which combined African-Americans and Lumbee Indians. A copy of that plan is located at 2C/27R-4 and included in Exhibit 10.

91. The Senate Congressional Redistricting Subcommittee also met on January 22, 1992, and decided to postpone any action until the House had passed a new plan.

92. The House Congressional Redistricting Committee met on January 23, 1992, and the Committee Co-chairmen presented 1992 CONGRESSIONAL BASE PLAN #9. This plan made a number of changes to BASE PLAN #7 that had been suggested by Democratic members of the committee. A copy of that plan is located at 2C-27H-4 and included in Exhibit 10. Rep. Decker proposed an amendment designed to keep Forsyth County intact

which was rejected by a vote of 16 to 10. Other amendments, which would have substituted Rep. Flaherty's plan and Rep. Justus' plan were also defeated; the Flaherty plan by a vote of 8 to 17; and the Justus plan by a vote of 9 to 16. No black legislators and only one Democrat voted for either of these plans. An amendment was proposed by Rep. Walter B. Jones, Jr., a white male Democrat, which moved four precincts in Pitt County out of the Second District and into the First District and moved three precincts in Edgecombe County from the First District to the Second District. The Jones amendment was adopted at the meeting by a vote of 18 to 9. This amendment had the effect of moving the residence of Rep. Jones and his father, Congressman Walter B. Jones, Sr., from the Second District to the First District. This amendment corresponded with Chapter 601, which also included Congressman Jones in the proposed majority black First District. BASE PLAN #9, as amended, became 1992 CONGRESSIONAL BASE PLAN #10, which was approved by the committee as a Committee Substitute to House Bill 3 to present on the House floor by a vote of 18 to 8. Exhibit 35 shows the committee votes by race and party.

93. On the House floor, on January 23, 1992, Reps. Flaherty and Justus offered the same amendments they had offered in committee. The amendments were defeat [sic] 40 to 71 and 35 to 72, respectively. All black and Native American representatives voted against the Flaherty amendment. No black or Native American representative voted for the Justus amendment (four black representatives did not vote). An amendment was also offered by Rep. James P. Green, Sr., an African-American Democrat, that would have reversed Rep. Jones' successful committee amendment involving the Pitt and Edgecombe precincts and made small changes in Warren and Halifax Counties. The amendment was defeated by a voice vote after being opposed by Committee Co-chairman Fitch. BASE PLAN #10 then passed

second reading by a vote of 72 to 40 and third reading by a vote of 72 to 39. All black and Native American representatives voted for the bill on second reading, and, except for one black House member not recorded as voting, the same was true on third reading. Exhibit 35 shows the roll call votes on the House floor by race and party. The plan was then sent to the Senate.

94. The Senate Redistricting Subcommittee met on January 24, 1992, to consider BASE PLAN #10 (HB3). An amendment was offered by Sen. Leo Daughtry, a white Republican, identical to the amendment Rep. Flaherty had offered in the House, and was defeated by a voice vote. No black Senators voted for this amendment. The bill was given a favorable report and went to the Senate floor that same day. On the floor of the Senate, BASE PLAN #10 passed second reading by a roll call vote of 29 to 17 with all five black Senators voting for the bill. Exhibit 36 shows the roll call vote by race and party. The plan then passed on third reading by a voice vote.

95. BASE PLAN #10, House Bill 3, was ratified as Chapter 7 of the 1991 Extra Session Laws on January 24, 1992. [ ]

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96. North Carolina submitted its Congressional redistricting plan, Chapter 7, to the U.S. Department of Justice for preclearance on January 28, 1992. [ ]

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98. By letter dated February 6, 1992, the U.S. Department of Justice precleared Chapter 7. [ ]

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100. An authentic copy of an article written by House Speaker Daniel Blue, Jr., and sent to all North Carolina daily newspapers after Chapter 7's preclearance is attached as Exhibit 41.

VI. Comparison of Congressional Districting Plans

101. The Congressional districting plan in effect from 1982 to 1992 divided four (4) counties into two separate Congressional districts. It divided no townships.

102. Chapter 601 divided 34 counties, 12 precincts, and two townships into two separate Congressional districts.

103. Chapter 7 divided a total of 43 counties. Of these, 36 are divided among two Congressional districts, and 7 are divided among three congressional districts. Precinct-level information is available for 69 of North Carolina's 100 counties. In these 69 counties, Chapter 7 divided 80 precincts into separate Congressional districts. Two of these precincts are divided into three Congressional districts (Chambersburg precinct in Iredell County and a precinct in Davidson County). One of the portions of the precinct in Davidson County that was divided into a third Congressional District had no residents living in it.

104. Chapter 601 contained a single majority black district, the First District. Blacks comprised 52.18% of the voting age population and 51.34% of the registered voters in Chapter 601's First District.

105. Chapter 7 contains two majority-black districts, the First and the Twelfth. The First District has a black voting age population of 53.40% and a black registered voter population of 52.41%. The Twelfth District has a black voting age population of 53.34% and a black registered voter population of 54.71%.

* * * *

108. Of the 40 North Carolina counties covered under Section 5 of the Voting Rights Act, the following 16 are not included in Chapter 7's First or Twelfth Districts: Jackson, Cleveland, Anson, Union, Scotland, Robeson, Hoke, Harnett, Lee, Onslow, Franklin, Camden, Granville, Person, Caswell, and Rockingham.

109. Of the 40 North Carolina counties covered by Section 5 of the Voting Rights Act, the following 8 counties are entirely included within the First District: Perquimans, Gates, Chowan, Hertford, Bertie, Washington, Northampton, and Greene. Of the 40 North Carolina counties covered by Section 5 of the Voting Rights Act, portions of the following 14 counties are included in the First District: Bladen, Cumberland, Craven, Lenoir, Wilson, Pitt, Beaufort, Edgecombe, Nash, Vance, Halifax, Martin, Pasquotank and Wayne.

110. Of the 40 North Carolina counties covered by Section 5 of the Voting Rights Act, none is entirely included within the Twelfth District. Of the 40 North Carolina counties covered by Section 5 of the Voting Rights Act, portions of the following two counties are included in the Twelfth District: Gaston, Guilford.

111. Of the 60 North Carolina counties which are not covered by Section 5 of the Voting Rights Act, the following six counties are included, in whole or in part, in the First District: Pender, Duplin, Columbus, New Hanover, Jones, and Warren. Of the 60 North Carolina counties which are not covered by Section 5 of the Voting Rights Act, the following eight counties are included in part in the Twelfth District: Mecklenburg, Iredell, Rowan, Davidson, Forsyth, Alamance, Orange, and Durham.

112. Of the 552,386 citizens who live in the First District, 80,218, or approximately 14.5%, reside in counties which are not covered by Section 5 of the Voting Rights Act. Of the 552,386 citizens who live in the Twelfth District, 405,150, or approximately 73.4%, reside in counties which are not covered by Section 5 of the Voting Rights Act.

113. All of North Carolina is covered by Section 2 of the Voting Rights Act.

VII. Geographic, Demographic and Electoral Information

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118. According to the 1990 Decennial Census, North Carolina's total population in 1990 was 6,628,637. Of these persons, 5,008,491 (75.6%) were white, 1,456,323 (22%) were black, 80,135 (1.2%) were American Indian, 52,166 (0.7%) were Asian, and 31,502 (0.4%) were of other races. The statistics on American Indians include members of the Cherokee, Haliwa, and Lumbee tribes.

119. According to the 1990 Census, North Carolina's total voting age population was 5,022,488. Of these persons, 3,902,539 (77.7%) were white, 1,007,856 (20.0%) were black, 53,649 (1%) were American Indian, 36,824 (0.7%) were Asian and 21,620 (0.4%) were of other races. The statistics on American Indians include members of the Cherokee, Haliwa, and Lumbee tribes.

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121. Basic demographic and socio-economic data for each of North Carolina's 1992 Congressional Districts was issued by the Bureau of the Census in January, 1993 in a publication entitled "Population and Housing Characteristics for Congressional Districts of the 103rd Congress—North Carolina." This data is also contained on computer tapes. For purposes of these proceedings the parties stipulate to the accuracy of that data. The parties further stipulate that this publication and data was not available to the General Assembly during the passage of Chapter 601 or Chapter 7.

122. Basic demographic and socio-economic data for each of North Carolina's 1982 congressional Districts was issued by the Bureau of the Census in March, 1983 in a publication entitled "Census of Population and Housing, Congressional Districts of the 98th Congress — North Carolina." For purposes of these proceedings the parties stipulate to the accuracy of that data. The parties further stipulate that this information was not loaded into

the State's computer system for use during the passage of Chapter 601 or Chapter 7.

123. According to the 1992 North Carolina Agricultural Statistics published by The North Carolina Department of Agriculture:

a. N.C. is ranked 10th nationally in farm cash receipts. Part of 8 of the following top 10 counties in cash receipts are in the First District: Pitt, Wilson, Nash, Columbus, Wayne, Duplin, and Halifax.

b. N.C. is ranked 1st nationally in total tobacco production. Part of 5 of the following top 10 counties in tobacco production are in the First District: Pitt, Nash, Columbus, Wilson, and Wayne.

c. N.C. is ranked 15th nationally in corn for grain. All or part of 7 or the following top 10 counties in corn for grain are in the First District: Hyde, Beaufort, Duplin, Pitt, Bertie, Columbus, and Wayne. Of these counties, only Bertie is totally encompassed by the First District.

d. N.C. is ranked 1st nationally in sweet potatoes. Part of 7 of the following top 10 counties in sweet potato production are in the First District: Nash, Wilson, Columbus, Edgecombe, Pender, Duplin and Wayne.

e. N.C. is ranked 9th nationally in cotton production. All or part of 8 of the following top 10 counties in cotton production are in the First District: Halifax, Northampton, Wayne, Edgecombe, Bertie, Pitt, Greene, and Lenoir. Of these counties, only Northampton, Bertie and Greene are entirely encompassed by the First District.

f. N.C. is ranked 4th nationally in peanut production. All or part of all 10 of the following top 10 counties in peanut production are in the First District: Northampton, Halifax, Bertie, Martin, Edgecombe, Hertford, Gates, Chowan, Pitt and Bladen.

Of these counties, only Northampton, Bertie, Hertford, Gates and Chowan are entirely encompassed by the First District.

g. N.C. is ranked 6th nationally in number of hogs on farms. All or part of 7 of the following top 10 counties in hog production are in the First District: Duplin, Greene, Wayne, Bladen, Pitt, Washington and Lenoir. Of these counties, only Green is encompassed by the First District.

h. Of the 20 counties listed in paragraphs a-g, the following 6 counties are covered by Section 5 of the Voting Rights Act and are entirely encompassed b[y] the First District: Bertie, Northampton, Greene, Hertford, Gates, and Chowan.

i. Of the 20 counties listed in paragraphs a-g, the following 9 counties are covered by Section 5 of the Voting Rights Act and are partially encompassed by the First District: Pitt, Nash, Wayne, Halifax, Beaufort, Edgecombe, Lenoir, Martin and Bladen.

j. Of the 20 counties listed in paragraphs a-g, the following 5 counties are not covered by Section 5 of the Voting Rights Act and are partially encompassed by the First District: Wilson, Columbus, Duplin, Hyde, and Pender.

• • • •

125. In 1968, Eva Clayton, an African-American candidate, ran for Congress in the Second District. She was defeated in the Democratic primary by L. H. Fountain, a white incumbent. In 1972, Howard Lee, an African-American candidate, ran for Congress in the Second District. He was defeated in the Democratic primary by L. H. Fountain, a white incumbent.

126. In 1982, Mickey Michaux, an African-American candidate, received 48.7% of the vote in the first Democratic primary. Under the state law in effect at the

time, over 50% was required to win a primary election. In 1982, Mr. Michaux lost the second primary to Tim Valentine, a white Democrat. In 1984, Kenneth Spaulding, an African-American candidate, ran for Congress in he Second District, while Howard Lee and John Winters, Jr., both of whom were black candidates, ran for Congress in the Fourth District. All three black candidates were defeated by white incumbents.

127. In 1989, the General Assembly passed a law providing that a 40% plurality in any primary election would be sufficient for the party nomination. This law was intended to facilitate the nomination of minority candidates. This law became effective for the 1990 elections. See G.S. § 163-111.

128. In 1990, no black candidates ran for Congress.

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134. On July 29, 1981, the General Assembly enacted a congressional redistricting plan for congressional elections beginning in 1982. 1981 N.C. Sess. Laws ch. 894. This plan was submitted to the United States Department of Justice for preclearance pursuant to Section 5 of the Voting Rights Act. By letter dated December 7, 1981, the Department of Justice denied preclearance. On February 11, 1982, the General Assembly enacted a revised plan. 1981 N.C. Sess. Laws ch. 7 (1982 Extra Session). By letter dated March 11, 1982, the Department of Justice precleared the revised plan. Copies of Chapter 894, the December 7, 1981 letter denying preclearance, Chapter 7 and the March 11, 1982 letter granting preclearance are attached as Exhibit 195.

135. As of January 1989, out of 170 state legislators in North Carolina, 15 (8.8 percent) were black.

136. North Carolina's Democratic primaries are closed. North Carolina's Republican primaries were opened to unaffiliated voters in 1988.

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Exhibit 20

[Letterhead of Congressman Tim Valentine, House of Representatives
Washington, D.C. 20515]

December 23, 1991

The Honorable Daniel T. Blue, Jr.
Speaker of the House
State Legislative Building
Room 2317
Raleigh, NC 27611

Dear Mr. Speaker:

I am writing in connection with the Congressional redistricting process in light of the recent action by the U.S. Department of Justice.

In my view, the General Assembly acted in good faith and made every effort to comply with applicable laws and protect the rights and interests of minority voters in drawing new Congressional districts for North Carolina. Under the plan approved by the General Assembly, minority influence is maximized in both the minority majority district and all other Congressional districts.

Based on the information that I have reviewed, further concentrating minority citizens into two minority majority districts would likely have the effect of significantly diluting minority influence in virtually all other districts. For that reason, I believe that this matter should now be pursued in the federal courts through an immediate and expedited effort to seek a declaratory judgment that the Congressional redistricting plan previously adopted has neither the purpose nor the effort of discriminating on the basis of race or color.

I appreciate the efforts already made by the General Assembly as well as your consideration of this request.

Cordially,

/s/ Tim Valentine
Tim Valentine

TV:en

Exhibit 20 (Cont'd)

[Letterhead of Congressman H. Martin Lancaster,
Longworth Office Building, Washington, D.C. 20515]

December 20, 1991

Hon. Henson Barnes
Speaker Pro Tem
North Carolina Senate
Raleigh, North Carolina 27611

Dear Senator Barnes:

My colleagues in Congress and I know that the General Assembly made a good faith effort to draw Congressional District lines in a manner to maximize the influence of minority voters in not only a minority majority district, but in all other districts as well. We believe that further concentration of minority voters in a second minority majority district will significantly dilute their influence in many, if not all districts. Therefore, I join my Congressional colleagues in respectfully requesting that immediate and expedited legal action be taken in the federal courts to seek a declaratory judgment that the Congressional redistricting plan previously adopted has neither the purpose nor will it have the effect of denying or abridging the right to vote on account of race or color.

Thank you for your prompt attention to this request.

Sincerely,

/s/ H. Martin Lancaster
H. Martin Lancaster
Member of Congress

Exhibit 20 (Cont'd)

[Letterhead of Congressman H. Martin Lancaster,
Longworth Office Building, Washington, D.C. 20515]

December 20, 1991

Hon. Dan Blue, Jr.
Speaker
North Carolina House of Representatives
Room 2317
Raleigh, North Carolina

Dear Speaker Blue:

My colleagues in Congress and I know that the General Assembly made a good faith effort to draw Congressional District lines in a manner to maximize the influence of minority voters in not only a minority majority district, but in all other districts as well. We believe that further concentration of minority voters in a second minority majority district will significantly dilute their influence in many, if not all districts. Therefore, I join my Congressional colleagues in respectfully requesting that immediate and expedited legal action be taken in the federal courts to seek a declaratory judgment that the Congressional redistricting plan previously adopted has neither the purpose nor will it have the effect of denying or abridging the right to vote on account of race or color.

Thank you for your prompt attention to this request.

Sincerely,

/s/ H. Martin Lancaster
H. Martin Lancaster
Member of Congress

Exhibit 20 (Cont'd)

[Letterhead of Congressman David Price, House of Representatives
Washington, D.C. 20515]

December 23, 1991

Senator Henson Barnes
Speaker Pro Tem
North Carolina State Senate
2017 Legislative Office Building
Raleigh, North Carolina 27611

Dear Senator Barnes:

I am writing to express my concern about the recent action of the U.S. Department of Justice in objecting to the congressional redistricting plan adopted by the General Assembly in July. Even though the Department acknowledges that "the needless packing of minority constituents into a minimal number of districts" is a primary consideration for rejecting plans under the Voting Rights Act, their suggestion of a second majority-minority district appears to be in direct contradiction to such a consideration.

Creating a second majority-minority district would seriously dilute the influence of minority voters in a number of other districts. This would reduce their ability in those districts to choose representatives who reflect the interests and concerns of minority voters. I believe this would be a step backward in the fight to insure voting rights for all our citizens.

I request that you and your colleagues in the legislature carefully review your options. I believe that it would be appropriate to seek immediate and expedited action in the United States District Court for a declaratory judgment that the congressional redistricting plan has neither the purpose nor will it have the effect of denying or abridging the right to vote on account of race or color.

Thank you for your consideration of this request and best wishes for a prosperous and productive New Year.

Sincerely,

/s/ David Price
David Price
Member of Congress

DP:gc

Exhibit 20 (Cont'd)

[Letterhead of Congressman Steve Neal, House of Representatives]

December 20, 1991

The Honorable Dan Blue, Jr
Speaker
North Carolina House of Representatives
Raleigh, N.C. 27611

Dear Speaker Blue:

It certainly appears to me that the General Assembly acted in good faith in drawing the Congressional District lines to maximize the influence of minority voters throughout our State. I have to agree with the leadership of the General Assembly that further concentrating minority voters by creating a second minority majority district would significantly weaken their influence in the remaining congressional districts. This would, in effect, violate the purpose of the voting Rights Act Amendments of 1982.

I respectfully urge the General Assembly to immediately exercise its right under the Voting Rights Act Amendments of 1982 to seek a declaratory judgment from the United States District Court that the Congressional redistricting plan adopted by the State does not deny or abridge the right to vote on account of race or color.

Thank you for your consideration

Sincerely,

/s/ Stephen L. Neal
STEPHEN L. NEAL
Member of Congress

Exhibit 20 (Cont'd)

[Letterhead of Congressman David Price, House of Representatives
Washington, D.C. 20515]

December 23, 1991

Hon. Daniel T. Blue, Jr.
Speaker
North Carolina House of Representatives
Room 2317
Raleigh, North Carolina 27611

Dear Speaker Blue:

I am writing to express my concern about the recent action of the U.S. Department of Justice in objecting to the congressional redistricting plan adopted by the General Assembly in July. Even though the Department acknowledges that the "needless packing of minority constituents into a minimal number of districts" is a primary consideration for rejecting plans under the Voting Rights Act, their suggestion of a second majority-minority district appears to be in direct contradiction to such a consideration.

Creating a second majority-minority district would seriously dilute the influence of minority voters in a number of other districts. This would reduce their ability in those districts to choose representatives who reflect the interests and concerns of minority voters. I believe this would be a step backward in the fight to insure voting rights for all our citizens.

I request that you and your colleagues in the legislature carefully review your options. I believe that it would be appropriate to seek immediate and expedited action in the United States District Court for a declaratory judgment that the congressional redistricting plan has neither the purpose nor will it have the effect of denying or abridging the right to vote on account of race or color.

Thank you for your consideration of this request and best wishes for a prosperous and productive New Year.

Sincerely,

/s/ David Price
David Price
Member of Congress

DP:gc

Exhibit 20 (Cont'd)

[Letterhead of Congressman V. G. (Bill) Hefner,
House of Representatives, Washington, D.C. 20515]

December 23, 1991

Hon. Hanson Barnes
Speaker Pro-Tem
North Carolina Senate
Raleigh, North Carolina 27611

Dear Senator Barnes:

In the Congressional redistricting plan passed by the General Assembly, I believe every effort was made to draw Congressional district lines in a manner that would maximize the influence of minority voters in not only a minority-majority district, but in all other districts as well.

A further concentration of minority voters in a second minority-majority district will, in my judgment, dilute their influence in most districts.

I hope the General Assembly will undertake legal action in the Federal courts to seek a declaratory judgment that the Congressional redistricting plan as adopted will be upheld.

Thank you for your consideration of this request.

With kindest personal regards, I am

Sincerely,

/s/ Bill Hefner
BILL HEFNER
Member of Congress

BH:mp

Exhibit 20 (Cont'd)

[Letterhead of Congressman V. G. (Bill) Hefner,
House of Representatives, Washington, D.C. 20515]

December 23, 1991

Hon. Dan Blue, Jr.
Speaker
N.C. House of Representatives
Raleigh, North Carolina 27611

Dear Speaker Blue:

In the Congressional redistricting plan passed by the General Assembly, I believe every effort was made to draw Congressional district lines in a manner that would maximize the influence of minority voters in not only a minority-majority district, but in all other districts as well.

A further concentration of minority voters in a second minority-majority district will, in my judgment, dilute their influence in most districts.

I hope the General Assembly will undertake legal action in the Federal courts to seek a declaratory judgment that the Congressional redistricting plan as adopted will be upheld.

Thank you for your consideration of this request.

With kindest personal regards, I am

Sincerely,

/s/ Bill Hefner
BILL HEFNER
Member of Congress

BH:mp

Exhibit 22

[Letterhead of Rep. David G. Balmer, N.C. House of Representatives, 512 Legislative Office Building, Raleigh, N.C. 27603-5925]

August 5, 1991

Mr. John R. Dunne
Assistant Attorney General
U.S. Department of Justice
Civil Rights Division
Post Office Box 66128
Washington, DC 20035-6128

Dear Mr. Dunne:

I am enclosing copies of Congressional plans that I introduced into the Legislative record as bills and alternatively as amendments to the final Senate Bill 16 (Conference Base #6) which the Legislature adopted and forwarded to your office for pre-clearance. Each of the plans that I introduced were defeated by Legislative action either on the floor or in the House Congressional Redistricting Committee.

As I pointed out in floor debate several times, the boundary lines of the congressional districts in Conference Base #6 (SB 16) divide black population concentrations in a manner that neutralizes black voting potential in the State. For this and other reasons, I repeatedly warned my fellow Legislators that the Conference Base #6 did not comply with Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Accordingly, I introduced Congressional plans that do comply with Section 5.

Each of these plans has been drawn at precinct level except where block work was necessary to comply with the "one man-one vote" requirement of *Baker v. Carr*, 369 U.S. 186 (1962). As the first page of each plan shows, the total deviation of each plan is between 1 and 2

people (North Carolina's population is not equally divisible by 12). Each plan has a page outlining by district total population, registration, and elections history.

As you can see from careful examination of my Congressional plans, there are several ways to create *two* minority (Black or American Indian as protected groups under the Voting Rights Act) Congressional districts in North Carolina. Most of the Counties used to create these minority Congressional districts are Counties subject to Section 5 of the Voting Rights Act. The plans enclosed are three alternative ways to configure North Carolina's 12 Congressional districts to include 2 minority Congressional districts. There are several other ways to draw 2 minority districts from variations of these three alternatives.

It is my understanding that several organizations are planning to file official comments with your department concerning the North Carolina Congressional plan. Therefore, I am just enclosing 3 plans with this cover letter for your review.

If I can supply you with any additional information concerning these Congressional districts, I will be happy to do so.

Sincerely,

/s/ David G. Balmer
David G. Balmer

Exhibit 23

[Letterhead of Rep. David G. Balmer, N.C. House of Representatives, 512 Legislative Office Building, Raleigh, N.C. 27603-5925]

September 27, 1991

Mr. John R. Dunne
Assistant Attorney General
U.S. Department of Justice
Civil Rights Division
Post Office Box 66128
Washington, D.C. 20035-6128

RE: Section 5 Comment Letter concerning State of North Carolina's submission of Ratified Senate Bill 16 (Conference Base 6), 1991 Session Laws Chapter 601, redistricting the 12 Congressional Districts allotted to North Carolina in the United States House of Representatives

Dear Mr. Dunne:

I write this letter on behalf of all North Carolinians on the State of North Carolina's submission of Ratified Senate Bill 16 (Conference Base 6), 1991 Session Laws Chapter 601 (hereinafter referred to as the "RATIFIED VERSION), redistricting the 12 Congressional Districts allotted to North Carolina in the United Stated House of Representatives. The RATIFIED VERSION was submitted to the United States Attorney General for preclearance under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. On behalf of all the citizens of North Carolina, I urge you to object and not preclear the RATIFIED VERSION because it unfairly discriminates against blacks and American Indians by diluting their voting strength.

I am enclosing copies of Congressional plans that I introduced into the Legislative record as bills and alternatively as amendments to the RATIFIED VERSION. Each of the plans that I introduced were defeated by

Legislative action either on the floor or in the House Congressional Redistricting Committee.

As I pointed out in floor debate several times, the boundary lines of the RATIFIED VERSION divide black and American Indian population concentrations in a manner that neutralizes their voting potential in the State. For this and other reasons, I repeatedly warned my fellow Legislators that the RATIFIED VERSION did not comply with Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Accordingly, I introduced Congressional plans that do comply with Section 5.

Each of the plans I submitted to the Legislative record were drawn at precinct level except where block work was necessary to comply with the "one man-one vote" requirement of *Baker v. Carr*, 369 U.S. 186 (1962). Modifying *Baker v. Carr*, the United States Supreme Court further ruled in *Karcher v. Daggett*, 462 U.S. 725 (1983) that a New Jersey redistricting plan had to make districts identical in population if possible. As the first page of each of my plans shows, the total deviation of each plan is between 1 and 2 people (North Carolina's population is not equally divisible by 12). Each plan has a page outlining by district total population, registration, and elections history.

As you can see from careful examination of my Congressional plans, there are several ways to create *two* minority (Black or American Indian as protected groups under the Voting Rights Act) Congressional districts in North Carolina. Most of the Counties used to create these minority Congressional districts are counties subject to Section 5 of the Voting Rights Act. The plans enclosed are three alternative ways to configure North Carolina's 12 Congressional districts to include 2 minority Congressional districts. There are several other ways to draw 2 minority districts from variations of these three alternatives.

BALMER CONGRESS VERSION 6.2

I began meeting with Mr. Bill Gilkeson of the Legislature's Research Division staff in early March 1991 about the concept of drawing a minority Congressional district from the black neighborhoods of Charlotte to the black neighborhoods of Wilmington including all pockets of black and American Indians in between these two cities. In fact, I used census data to manually draw a congressional district that was 54% minority and prepared a memorandum on my own personal computer outlining which precincts and townships should be included in this district. I gave copies of this memorandum to House Speaker Daniel T. Blue, Jr. (Democrat—Wake County), Co-Chairmen of House Redistricting Committee Milton F. Fitch, Jr. (Democrat—Wilson County), Rector Samuel Hunt, III (Democrat—Alamance County), Edward C. Bowen (Democrat—Sampson County) and Chairman of the Senate Redistricting Committee, Senator Dennis Winner (Democrat—Buncombe County).

I released copies of this memorandum to several other black Legislators including Rep. H. M. "Mickey" Michaux, Jr. (Democrat-Durham County), Rep. Thomas Hardaway (Democrat—Halifax County), Rep. W. "Pete" Cunningham (Democrat—Mecklenburg County), and Senator James Richardson (Democrat—Mecklenburg County). I also gave copies of this memorandum to the Legislative staff, specifically Gerry Cohen, Director of Legislative Drafting, Linwood Jones and Bill Gilkeson from the Research Division.

All of the Legislators mentioned above remarked as to the length of the district stretching from Charlotte to Wilmington (about 200 miles). Of course, my proposed Charlotte to Wilmington district is not nearly as long as District 2 or 12 under the RATIFIED VERSION.

The N.C. General Assembly's Mapping and Redistricting Information System (MARIS) computer was not

loaded with all the census data until April 26, 1991. The Legislative staff from the Bill Drafting Division and Research Division were the first people trained on this system, and their training session began April 26, 1991. Mr. Cohen, Mr. Jones and Mr. Gilkeson were trained and prepared to use this system as of April 29, 1991. At first, Speaker Blue had ruled that only members of the Redistricting Committee would be allowed to take MARIS training. Speaker Blue later relaxed the rules on MARIS training to open it up to all Legislators. I was not trained and using the MARIS computer until June 4, 1991, the day after my first presentation of BALMER CONGRESS 6.2 to the House Congressional Redistricting Committee.

Therefore, up until the time I was trained on June 4, 1991, I had to request that computer work be done through Mr. Gilkeson who had been assigned to investigate my idea of a Charlotte to Wilmington minority district. Speaker Blue established rules as to the priority given to staff computer time that gave all preference to members of the redistricting committees. Mr. Gilkeson had many other computer redistricting assignments from other Legislators, all of whom were on the committee. I requested to be appointed to the redistricting committees, but Speaker Blue did not appoint me.

I met with Mr. Gilkeson almost daily during the month of May to complain to him as to the lack of his progress on my plan. He repeatedly told me that he was being instructed by his superiors to give preference to computer work requested by Congressional Redistricting Committee members. He finally finished my plan, which I named BALMER CONGRESS 6.2., on May 28, 1991.

I held a press conference on May 29, 1991 in the Legislature's Press Conference Room to unveil BALMER CONGRESS 6.2. Eight reporters attended the press conference and the plan received press coverage in several of North Carolina's daily newspapers.

I presented BALMER CONGRESS 6.2 to the House Congressional Redistricting Committee on June 3, 1991 and answered questions of the Committee concerning the plan. On June 4, 1991, the House Congressional Redistricting Committee voted to refuse to allow BALMER CONGRESS 6.2 to be sent to the public hearings phase of the procedure. Instead, the Committee voted to send Congressional Base #2 to the public hearings across the state.

With BALMER CONGRESS 6.2, I began under the premise that I would maintain the concept of a black majority Congressional district in the Northeastern section of North Carolina, since the Democrat Legislators were including this black district in their plans. Nevertheless, the Northeastern black Congressional district (District 2) in BALMER CONGRESS 6.2 strengthens black voting potential in comparison to the Northeastern black district (District 1) in the RATIFIED VERSION. District 2 in BALMER CONGRESS 6.2 is 57.43% black in total all ages population (53.52% black registered voters), and Harvey Gantt (the black Democrat 1990 U.S. Senate candidate who ran against the white Republican Senator Jesse Helms) received 64.35% of the vote in District 2. On the other hand, District 1 in the RATIFIED VERSION is 55.69% black in total all ages population (51.34% black registered voters), and Harvey Gantt received 62.20% of the vote in 1990 in District 1. District 2 in the BALMER CONGRESS 6.2 has a higher black population than District 1 in the RATIFIED VERSION because District 2 includes the black neighborhoods in South Raleigh in Wake County.

In addition to drawing a better black Congressional district in the Northeastern part of North Carolina, in BALMER CONGRESS 6.2 I drew a *second* minority Congressional district that runs along the South Carolina border from Charlotte to Wilmington. The RATIFIED

VERSION has ignored the high concentrations of black and Lumbee Indian populations in Southern North Carolina. District 12 in BALMER CONGRESS 6.2 has been drawn along the South Carolina border area of North Carolina which is included in Districts 3, 7, 8 and 9 under the RATIFIED VERSION. The following chart illustrates how the Democrat majority in the North Carolina Legislature submerged Black and American Indian voting potential in the RATIFIED VERSION when compared to District 12 in BALMER CONGRESS 6.2.

	BLACK POP.	AMER.IND.POP.	GANTT VOTE
BALMER CONGRESS 6.2			
District 12	48.06%	8.30%	69.14%
RATIFIED VERSION			
District 3	24.46%	0.52%	43.63%
District 7	24.32%	8.26%	50.47%
District 8	24.13%	1.66%	44.55%
District 9	24.98%	0.37%	56.69%

Before the Democrat Legislative majority killed BALMER CONGRESS 6.2 in the House Congressional Redistricting Committee, the Democrats claimed that BALMER CONGRESS 6.2 "packed" all the blacks in North Carolina into two Congressional districts thereby diluting black impact on the other ten districts. In fact on June 26, 1991, I debated Rep. Fitch, Congressional Redistricting Committee Co-Chairman, at Meredith College on Congressional Redistricting. During the debate, he admitted that a second minority Congressional district could be drawn along the South Carolina border, but he felt that would dilute minority voting strength in other congressional districts in the State. The following chart proves that this Democrat charge was simply untrue and completely unsupported by the population data.

COMPARISON OF NUMBER OF DISTRICTS WITH MORE THAN 20 PERCENT BLACK POPULATION

	Black Population	Gantt Vote
BALMER CONGRESS 6.2		
District 1	23.55%	42.71%
District 2	57.43%	64.35%
District 3	20.93%	50.10%
District 6	21.45%	46.33%
District 7	20.08%	42.68%
District 12	48.06%	69.14%

Total Districts more than 20% Black = 6
Total Districts carried by Gantt = 3

RATIFIED VERSION		
District 1	55.69%	62.20%
District 2	21.91%	38.81%
District 3	24.46%	43.63%
District 6	25.20%	47.77%
District 7	24.32%	50.47%
District 8	24.13%	44.55%
District 9	24.98%	56.69%

Total Districts more than 20% Black = 7
Total Districts carried by Gantt = 3

So when comparing BALMER CONGRESS 6.2 to the RATIFIED VERSION, anyone easily can see that BALMER CONGRESS 6.2 maintains a strong black voting influence on the remaining 10 Congressional districts, and Harvey Gantt carried three Congressional districts under both BALMER CONGRESS 6.2 and the RATIFIED VERSION.

BALMER CONGRESS 7.8
(Balmer Congress 7.4)

BALMER CONGRESS 7.8 was introduced into the Legislative record as House Bill 1310 which was sent to the House Congressional Redistricting Committee where it was never brought up for discussion by the Co-Chairmen of that Committee. BALMER CONGRESS 7.8 is identical to the plan named BALMER CONGRESS 7.4. I introduced House Bill 1310 as BALMER CONGRESS 7.8, but its name in the MARIS Computer remained BALMER CONGRESS 7.4. For the purpose of this comment letter, I will refer to this plan by the name of BALMER CONGRESS 7.8.

I began BALMER CONGRESS 7.8 by drawing on the MARIS computer a black majority Congressional district (District 2) that stretches across Eastern and Southeastern North Carolina (see enclosed map). District 2 has a black all ages population of 53.30% and 54.11% black registered voters. Black registration is higher than black total population because District 2 under this plan includes three military bases where very few people are registered to vote.

District 2 covers Counties included in Districts 1, 2, 3 and 7 under the RATIFIED VERSION. The following chart illustrates how the Democrat majority in the North Carolina Legislature submerged black voting potential in the RATIFIED VERSION when compared to District 2 in BALMER CONGRESS 7.8.

	BLACK POP.	GANTT VOTE
BALMER CONGRESS 7.8		
District 2	53.30%	63.56%
RATIFIED VERSION		
District 1	55.69%	62.20%
District 2	21.91%	38.81%
District 3	24.46%	43.63%
District 7	24.32%	50.47%

I drew another black majority Congressional district (District 3) in BALMER CONGRESS 7.8 which stretches from the black neighborhoods of Winston-Salem in Forsyth County in the West to Halifax County in the East (see enclosed map). District 3 has a black all ages population of 55.39% and 53.03% black registered voters.

District 3 covers Counties included in Districts 1, 2, 4, 5 and 6 under the RATIFIED VERSION. The following chart illustrates how the Democrat majority in the North Carolina Legislature submerged black voting potential in the RATIFIED VERSION when compared to District 3 in BALMER CONGRESS 7.8.

	BLACK POP.	GANTT VOTE
BALMER CONGRESS 7.8		
District 3	55.39%	67.96%
RATIFIED VERSION		
District 1	55.69%	62.20%
District 2	21.91%	38.81%
District 4	19.65%	58.16%
District 5	18.76%	45.65%
District 6	25.20%	47.77%

BALMER CONGRESS 8.1

BALMER CONGRESS 8.1 was introduced into the Legislative record as a plan submitted to the Co-Chair-

men of the House Congressional Redistricting Committee where it was never brought up for discussion. I began BALMER CONGRESS 8.1 by drawing on the MARIS computer a black majority Congressional district (District 2) that stretches across Eastern and Southeastern North Carolina (see enclosed map). District 2 has a black all ages population of 58.47% and 55.00% black registered voters.

District 2 in BALMER CONGRESS 8.1 covers Counties included in Districts 1, 2, 3, 4 and 7 under the RATIFIED VERSION. The following chart illustrates how the Democrat majority in the North Carolina Legislature submerged black voting potential in the RATIFIED VERSION when compared to District 2 in BALMER CONGRESS 8.1.

	BLACK POP.	GANTT VOTE
BALMER CONGRESS 8.1		
District 2	58.47%	63.82%
RATIFIED VERSION		
District 1	55.69%	62.20%
District 2	21.91%	38.81%
District 3	24.46%	43.63%
District 4	19.65%	58.16%
District 7	24.32%	50.47%

I drew another black majority Congressional District (District 12) in BALMER CONGRESS 8.1 which stretches from the black neighborhoods of Charlotte to the black neighborhoods of Durham (see enclosed map). District 12 has a black all ages population of 56.77% and 55.67% black registered voters.

District 12 covers Counties included in Districts 2, 5, 6, 8, 9 and 12 under the RATIFIED VERSION. The following chart illustrates how the Democrat majority in the North Carolina Legislature submerged black voting potential in the RATIFIED VERSION when compared to District 12 in BALMER CONGRESS 8.1.

	BLACK POP.	GANTT VOTE
BALMER CONGRESS 8.1		
District 12	56.77%	71.61%
RATIFIED VERSION		
District 2	21.91%	38.81%
District 5	18.76%	45.65%
District 6	25.20%	47.77%
District 8	24.13%	44.55%
District 9	24.98%	56.69%
District 12	8.25%	32.75%

Enclosed are copies of each of the three plans (BALMER CONGRESS 6.2, BALMER CONGRESS 7.8 AND BALMER CONGRESS 8.1) which I introduced into the Legislative record.

The boundary lines of the RATIFIED VERSION divide black and American Indian population concentrations in a manner that neutralizes their voting potential in the State. For this and other reasons, the RATIFIED VERSION does not comply with Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Accordingly, I urge you to not preclear the RATIFIED VERSION because it unfairly discriminates against blacks and American Indians by diluting their voting strength.

If I can supply you with any additional information concerning these Congressional plans, I will be happy to do so.

Respectfully,

/s/ David G. Balmer
Rep. David G. Balmer

Exhibit 24

[Letterhead of North Carolina General Assembly,
300 N. Salisbury Street, Raleigh, N. C. 27603-5925]

November 3, 1991

MEMORANDUM

TO: United States Department of Justice

FROM: Gerry F. Cohen,
Director of Legislative Drafting

SUBJECT: Section 5 Reply: Question G2

In your letter of October 18, 1991, you asked for instructions to staff, whether verbal or written, regarding development of the proposed plans, and to provide notes or memorandum [sic] used by or between committee members or staff.

This document G2-1 deals with my response. Attached are documents G2-2, that of Leslie Winner, G2-3, that of Linwood Jones, Sara Kamprath, Bill Gilkeson, and Carolyn Johnson, and G2-4, that of Giles Perry.

This memorandum deals with my instructions, notes or memorandum [sic]. I received no written instructions. All of my instructions were oral. A summary of oral instructions follows, then a listing of attached memorandum [sic]. (I have no notes)

CONGRESSIONAL: At the time I was trained on the computer system, Representative Fitch asked me to develop a minority Congressional district. Having worked as a volunteer in the congressional campaigns in 1972: Second District Howard Lee (B), 1982: Second District H.M. Michaux (B), 1984: Second District Kenneth Spaulding (B), 1986: Fourth District Howard Lee (B), and having run for political office four times myself, I considered myself knowledgeable concerning electoral politics and especially black electoral politics at the Congressional

level in North Carolina. My instructions were to insure that a black was electable, by having at least 50% of the registered voters being black, but without packing the district with more black voters than was necessary to ensure that minority voters had an equal opportunity to elect a candidate of their choice in the district. My initial conception of the district was based largely on a modification of the existing Second District, but after discussing this with Representative Fitch, he instructed me to remove Person and Caswell Counties from the proposed district and instead move the district into Jones and Craven Counties. These Counties (Craven and Jones) had historically been part of the Second District which elected black Congressmen in the 19th century. I was asked to develop the district so that Rep. Valentine was not in the district. I understood from the committee chairs that Rep. Jones would likely retire, and the district should be an open seat so that a black candidate would not have to run against a white incumbent.

During the development of Congressional Plans 1-6, the boundaries of the proposed First District changed constantly, but always around the same general core, and my instructions were to keep the district such that a black would be elected, which I did.

I was also instructed by Senator Walker to have the Fourth District consist primarily of Wake, Orange and Chatham Counties, with part of Franklin if at all possible.

I worked with Senators Winner and Walker and the House co-chairs after they had developed the outline of Congressional Base #1 to bring the population deviation to within about +-200. I also was instructed in the later plans to divide the minimum number of precincts possible to bring the deviation down to +1 person to comply with *Karcher v. Daggett*, and did so by dividing 11 precincts in several of the plans.

At the beginning of the conference process, I was instructed by the House conferees to add Harlowe precinct, a predominantly black precinct in Craven County, to the first District, which the Senate accepted.

Besides the above, I acted as a computer operator, moving precincts and counties at the direct instruction of the co-chairs, without any discretion.

• • • •

Exhibit 25

[Letterhead of North Carolina General Assembly,
300 N. Salisbury Street, Raleigh, N. C. 27603-5925]

October 14, 1991

MEMORANDUM

TO: United States Department of Justice

FROM: Gerry F. Cohen,
Director of Legislative Drafting

SUBJECT: North Carolina submittals 91-3184, 91-2724, 91-3178:
Response to ACLU/Kathleen Wilde comment
Response to Representative Herman Gist comment
Response to Representative David Balmer comment
Response to Commissioner Cary Allred comment
Response to Rockingham Co. Bd. of Commissioners comment

This memorandum primarily answers the comments made in the September 25, 1991 comment of the American Civil Liberties Union Foundation (ACLU) signed by Kathleen Wilde, concerning the North Carolina House (91-3184), Senate (91-3178) and Congressional (91-2724) submittals. It also answers the August 23, 1991 comment of Representative Herman Gist concerning the House submittal, the August 5, 1991 comment of Representative David Balmer concerning the Congressional submittal, the September 9, 1991 comment of Commissioner Cary Allred concerning the Senate submittal, and the July 18, 1991 comment of the Rockingham County Board of Commissioners concerning the House submittal. Each major point in the comments is paraphrased (with page number citation) and replied to. Each comment and answer begins on a new page. Exhibits appear at the

end. Paraphrased comments are in regular typeface, our replies are in bold.

This memorandum is submitted on behalf of Representative Toby Fitch, co-chair of the House redistricting committees, Senator Dennis Winner, chair of the Senate Redistricting Committee, and House Speaker Daniel T. Blue, all of whom met with Department of Justice staff on September 30, 1991 concerning the three plans.

¶1) With respect to the racially discriminatory plans . . . I strongly urge you to interpose an objection under Section 5 (ACLU page 1)

Since there is no allegation as to Section 5 covered counties that our plans are retrogressive, the Department of Justice must focus on whether they have a discriminatory purpose, i.e. a purpose to diminish or limit the ability of black voters to participate in and to elect representatives of their choice, or that there is a clear violation of Section 2. As to the latter, the burden of proof is on the opponents to demonstrate it, and the violation must be clear, not merely arguable. See 28 CFR 51.55(b)(2).

* * * *

¶15) Each of the three redistricting plans clearly violate Section 2 . . . As recently as 1984, a three-judge federal court held, and in 1986 the Supreme Court affirmed . . . [list of findings] . . . Each of these factors clearly exist today . . . Leslie Winner advised the committee that her "review of the data over the decade unfortunately suggests that racially polarized voting in North Carolina is not decreasing . . . (ACLU page 5-6)

It is important to note that the Gingles trial was in August 1983, almost ten years ago; therefore findings about conditions then cannot be assumed to be true today. Those findings were based on statistics

from 1978 through 1982. Also, the geographic areas in question in Gingles, with the exception of Senate District 2 and House District 8 as they existed in 1980, were different from the areas in question here . . . there is no evidence with regard to Guilford, Cumberland, the Southeast, the Anson to Robeson Area, or the Orange, Alamance, Rockingham area.

Importantly:

a) With regard to voter registration, the court found that the State had already taken steps to facilitate black registration as of 1983, but there had not then been time for that to bear fruit, by now there clearly has. Exhibit 2 to this memorandum is an Article from North Carolina Insight magazine, June, 1991, pages 32-33, where it is noted "Voter registration in North Carolina saw another big jump from minority registration increases, particularly in 1984 and 1980". 1984 was the Helms-Hunt Senate race, 1984 and 1988 were the Jesse Jackson presidential bid, and 1990 was the Gantt-Helms Senate race. North Carolina has made many changes in registration laws, and by the end of 1990, 63% of eligible blacks were registered to vote, compared with 68.6% of whites. According to the February 25, 1991 Charlotte Observer, (Exhibit 3) this 5.6% gap compares with a gap of 18.8% in 1980. The gains that the three-judge court had said had not occurred by the time of the 1983 trial have now occurred. This reduction was on account of concerted efforts on the part of the State and minority groups. This closing by 13.3% of the gap not only requires a smaller percentage of minority voters to create an effective black voting majority in a district in North Carolina, it also indicates an end to any discrimination

in voter registration. The Charlotte Observer article indicates that "[i]n almost a quarter of the State's counties, the percentage of registered voters among black adults is higher than the percentage of registered voters among white adults." (Exhibit 3)

North Carolina has permanent voter registration, and voters are only purged for failure to vote in two presidential elections and all elections conducted between those two elections. Thus any person who voted in: (i) the 1988 Presidential election; (ii) the 1990 Gantt-Helms (W) race; (iii) any election in between; (iv) municipal elections in 1991; (v) primary elections in 1992; or (vi) registers to vote between October 10, 1988 and October 10, 1992, will remain eligible to vote through the 1996 presidential election. Voting in any election from the 1992 presidential election through the 1996 presidential election extends eligibility through the 2000 presidential election. The ACLU comment seems to imply that high levels of voter registration and voting in the black community in recent years are to be ignored or disregarded. In fact, such high levels or participation are not only a continuing trend, they continue to make it easier for blacks to participate in the future, refute past histories, and indicate an end to racial discrimination in official election practices. Election events that will spur minority interest will continue to occur, whether it be from minority Presidential candidates like Governor Wilder (B) of Virginia, or the 1992 gubernatorial candidacy of James B. Hunt, Jr., (W) whose 1984 senatorial bid brought out large black registration and turnout. As compared with 1980, black electoral candidacies and

successes have shown a marked increase at the statewide and local level, prompting increased black participation. Indeed, one could argue that packing black voters in districts that are beyond percentages necessary will reduce competition and reduce black turnout. The ACLU seems to imply that higher black percentages in black districts are better. In fact, the General Assembly has enacted three districting plans before you to enhance minority influence.

b) As far as racial appeals are concerned, aside from the racial appeals attributed to Senator Helms in 1990, (ACLU page 7) the ACLU shows no other evidence of them in the past decade since Gingles.

c) As far as polarized voting, the burden of proof is on the ACLU. On page 6, the ACLU quotes statements from Leslie Winner about polarized voting. This quote is taken out of context. Ms. Winner earlier on page 6 had talked about ". . . a history of racially polarized voting in that area of the State." Ms. Winner was not talking about the Guilford, Mecklenburg, Orange, Rockingham, Forsyth, Wake, Durham, Alamance, Cumberland etc., areas of the State. As an example, see further discussion of voting in Wake County in paragraph 42 of this reply.

* * * *

¶17) Given the presence and persistence of all of these Section [?] evidentiary factors, the only remaining issue under Gingles is whether the black population is sufficiently large and geographically compact to constitute a majority in a single-member district that was not drawn (ACLU page 7) [.]

The ACLU has failed to show how the Gingles findings apply to the districts they cite. Indeed to show the progress in reduction of racially polarized voting in North Carolina, the State used in its calculations of electability the showing of Harvey Gantt for the U.S. Senate campaign in 1990. This statistic is relevant. Evidence shows that the dramatic increase in black voter participation is a continuing, decade long trend.

Where relevant in its comments here, the State will discuss the issue of compactness, since ACLU has correctly noted the importance of that factor. ACLU also states that it is enough that ". . . the black population . . . constitute[s] a majority . . ." (ACLU page 7) Not only must it show that the absence of the district prevents minorities from electing a representative of their choice, it must also show that the districts have an effective black voting majority. They have failed to establish the proposition. When appropriate, this reply will show when it is clearly not the case.

For instance, as to racially polarized voting, to show progress from 1980 to 1990, the State has looked at indicators of white voting for candidate Gantt, as being the best showing on a statewide basis of white support for black candidates. In addition, Democratic candidates for the General Assembly and local offices tend to have a higher percentage vote than for statewide offices, so the presented statistics understate the number of white voters who will vote for a black local candidate. See discussion of evolution of voting for John Baker (B) in Wake County sheriff's race at paragraph 42 of this reply. Most black candidates and nominees in North Carolina are Democrats. In analyzing the districts, the State also looked at the percentage of Democrats who are black. North Carolina is a closed primary state (only

registered Democrats may vote in a Democratic primary), and the percentage of Democrats who are Black is higher than the percentage of all voters who are Black, since on a statewide average over 95% of all blacks registered to vote are registered as Democrats. An effective black voting majority among registered voters in the Democratic party is enough to make a black candidate the nominee, and the Gantt and other statistics used by the State showing whites who will vote for a black Democratic candidate in a general election are relevant to show how blacks can elect representatives of their choice in each minority district created by the General Assembly, many of which are attacked by the ACLU as having too few blacks.

For the purpose of exhibit 6, precincts in 69 counties were analyzed. It was first assumed that 100% of Blacks supported Gantt (to the extent that the percentage was less, the attached statistics understate the percentage of whites that voted for Gantt.) It was then assumed that blacks turned out at the same percentage as whites among those who registered to vote. (The ACLU seems to think that the black turnout was higher, but it also implies that White turnout was boosted by racist appeals, and shows no evidence for either[.]) The total votes in each precinct cast by blacks was then removed using these assumptions. Only precincts with 50% or more of the registered voters being black were even analyzed, as being more likely to result in a statistically accurate analysis.

In the 69 counties, in 165 predominantly white precincts a majority of the whites voted for Gantt, the Black candidate in the general election. In another 178 predominantly white precincts, 40-50% of the whites voted for Gantt. (See exhibit 65)

ACLU indicates that failure to create:

(1) "majority-black" House districts, or districts with what it alleges are insufficient percentages of blacks, including parts of Durham, Orange, Guilford, Forsyth, New Hanover and Mecklenburg counties;

(2) "majority-black" Senate districts, or districts with what it alleges are insufficient percentages of blacks, including Forsyth, Durham, Mecklenburg, and Wake counties; and

(3) an additional "majority-black" Congressional district, including Wake, Guilford, Forsyth, Mecklenburg, New Hanover counties

violates the Voting Rights Act. To show the lack of polarized voting, and effectiveness of black candidates, the statistics below (see Exhibit 7) show for each of these counties the number of predominantly white precincts where Gantt got 50% + and 40-50% of the white vote: These statistics do not even take into account the number of whites in predominantly black precincts who will vote for black candidates:

COUNTY	# 50% +	# 40-50%
DURHAM	17	3
FORSYTH	7	17
GUILFORD	12	26
MECKLENBURG	25	59
NEW HANOVER	2	9
ORANGE	26	2
WAKE	38	28

These statistics are used to buttress the State's analysis of each particular district that follows.

These statistics do not even take into account the number of whites in predominantly black precincts who will vote for black candidates. "It seems intuitively likely, for example, that whites who choose to live in

racially integrated neighborhoods are more likely than whites who choose to live in all-white areas to support black candidates . . ." (Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation, Karlan, 24 Harvard Civil Rights-Civil Liberties Law Review 173, 203 (1989)).

• • • •

¶19) Alternatives proposed by minority groups and by the Republican party drew three additional seats in the Southeast and Southcentral parts of the State. (ACLU page 8)

There is some confusion over the number of alternative districts proposed in the Southeast and Southcentral parts of the State. While both the ACLU and Republicans cite two districts that cover roughly the same areas (Duplin-Sampson-Wayne, Bladen-Pender-Brunswick-Columbus-New Hanover), there is a mention on ACLU page 14 of a district combining black populations in Jones and Onslow with Camp Lejeune, and a mention in the ACLU proposal to create a third district including parts of Jones and Craven counties. The Jones/Onslow/Lejeune district discussed by Mr. Shipman (B) (28-F-3(a), 3/21/91 transcript page 7) is in fact not analogous at all to the House district created in 1982 in Cumberland County, or the new Senate district created in 1991 in that county. In both those cases, the military base is a minority of the population in the district, thus, no reasonable amount of political organizing on the base by disaffected whites could swing the district. Shipman's plan, apparently to put 5,000 off-base predominantly black persons with 50,000 base personnel would not in fact be a black majority district at all. It would take a relatively minor registration effort among military personnel to make this district majority white in voter registration. The

ACLU third Southeast district substantially overlaps District 79 created by the enacted plan, would necessitate eliminating it as a minority district, and would have the effect of putting black incumbent Wainwright in a white district.

The State reads the ACLU comment as actually talking about <u>two</u> additional minority districts in the Southeast, as that is the gist of their remarks on ACLU pages 10-18, and one additional district in the Southcentral area.

• • • •

¶22) Southeast North Carolina . . . the total black population in this nine-county area . . . is enough to constitute a 65% majority in four single member districts, yet not a single majority black district was drawn in this region . . . [I]nstead the State continued . . . submerging and diluting black voting strength . . . As a result of a voting rights suit . . . Duplin County has two majority black county commission districts, as do neighboring Sampson (2/5) and Bladen (1 of 3) counties . . . these black commission districts could easily have been used as the foundation for majority black House Districts. (ACLU page 10-12)

Even though the black population of these 9 counties together is a 65% majority of 4 districts, no one has shown a map that demonstrates the possibility of four districts, because of the geographic dispersion of blacks in that part of the State. With regard to putting together the county commission districts in Bladen, Sampson, and Duplin, there are two problems. Leslie Winner states that ACLU exhibit 10 outlines the wrong district as the black district, D1 is black, not D3, and if their rendition of the Sampson black districts is correct, the county commission districts for the three counties are not contiguous. Leslie Winner tells me she can not [sic] tell from the

exhibit which Duplin district is black, and the combined population (9984 + 9910 + 9925 + 2/5 Duplin) does not add up to enough for a district.

As noted above, the State has used the Jones-Lenoir area to create minority District 79, so it can not [sic] be used to build minority districts in the nine-county area. Additionally, the Jones-Onslow minority district alluded to by Shipman is in the opinion of the State not a minority district because the effect of Camp Lejeune is not as alleged. This is covered in more detail earlier in this memorandum.

¶23) There is strong feeling on the part of black leaders in SE North Carolina that they were left out of the Gingles litigation . . . [in] the 1990 reapportionment they should be included . . . many other black citizens came to the public hearings and made the same request . . . draw some majority black districts in SE North Carolina . . . none of these plans were adopted and instead three majority white districts were created in that area. The assertion that co-chairman Bowen [W] was in contact with the three black commissioners from Bladen County and the two black commissioners from Sampson County, none of which asked him to create a black district in these counties is refuted by the black commissioners themselves . . . all state that Bowen never discussed the matter with them . . . (ACLU page 12-17)

The State knows nothing about an allegation that the Southeast was left out of the Gingles lawsuit. The State did not write the complaint in that lawsuit, since it was the defendant.

After the initial round of hearings at which some members of the black community requested that majority black districts be drawn in the southeast, the staff was instructed to determine if a black district could be drawn in the southeast using whole precincts in accordance with our criteria. Such district could not be created. The State heard nothing from black citizens in the Southeast until Wilde's letter of May 22. This was in contrast to the heavy input from minority citizens in the Robeson, Hoke, Scotland area. Staff analyzed the three districts in Wilde's letter, and determined that one overlapped with the Wainwright district that the State was creating (District 79). The State heard very little black support for the other two districts, despite the fact that one of the committee co-chairs is from that area and another committee co-chair is black.

The State does not allege that Bowen talked to the five black commissioners about the subject, but that he was in contact with those commissioners about various matters during the session, and they never urged him to create the minority districts. They knew he was the co-chair of the committee, and if they wanted him to support the ACLU plan purportedly submitted on their behalf, they had every opportunity to tell him that. In contrast the black Democratic party chair in Pender County asked Bowen not to divide that county, and there was sentiment in Bladen and Sampson not to divide the counties. Given a lot of sentiment not to divide, and a little support to divide, a decision was made not to divide them. There was no racially discriminatory intent behind this decision.

The State received no communication from any black person asking it to adopt the Pope Plan, and the Rhyne (W) amendment was not unveiled until presentation on the House floor, and the State received no communications about it either.

¶24) The fact that alternative districts cross county lines or split cities or other geographic units does not relieve the State of its obligation to create additional majority black districts. Further, the State's interest in

drawing districts along precinct lines is minimal. There are a great variety of election — municipal, county, judicial, as well as State legislative and Congressional — many of which split precincts to create election districts. Certainly, this has often been the case in creating racially fair election districts for county commissions and school boards. Indeed, it is rare that everyone in the same precinct would vote for all of the same offices. Under the proposed congressional plan, for example, many voters in the same precincts throughout N.C. will find themselves in different congressional districts . . . Division of precincts is the rule, not the exception. (ACLU page 17-18)

The criteria of not dividing precincts was adopted for several reasons. Political campaigns are the process by which candidates are elected. Political parties and candidate organizations are usually organized at the precinct level. ACLU repeatedly in its comments suggests that racial percentages could be "improved" by going to the block group or bloc level. But the State knows of no political organization or candidate committee organized at the block group or block level.

The State has been shown no evidence that division of precincts is the rule in North Carolina, or that it is rare that all the people in a precinct have the same ballot. In the Congressional plan, a total of 14 election precincts are divided out of about 2500 precincts in the State, and 3 of those precincts had all of their population in one of the districts. The 11 precincts where some population is in one district and the remainder is in another have a total population of 31808 out of a total State population of 6,628,632, or just 0.48% of the State's population.

In contrast, at the Senate redistricting Public hearing in Charlotte on March 16, 1991 (included in the congressional submittal as attachment C-28F-3(c)) two of the leading experts in the election law field, who have actual responsibility for conducting elections spoke. They were Professor Ted Arrington (W) the Republican chair of the Mecklenburg County Board of Elections, and William B.A. Culp (W), who has been the supervisor of elections in Mecklenburg County since 1971, and is a Democrat. Keep in mine that Mecklenburg is the largest county and has the most sophisticated election capability.

Dr. Arrington stated ". . . the technology of redistricting has taken a quantum leap in the decade . . . with the advent of the TIGER files . . . there are going to be a lot of other people giving you suggestions . . . that revolution in technology also brings up another — and I can only describe it as a nightmare . . . and that nightmare is . . . splitting precincts. I realize [if] you [sic] going to have to split counties we have been doing that for decades . . . that's not very harmful . . . if you begin to split precincts, at least in Mecklenburg County, you're going to make it impossible for us to run the election system . . . if you begin to put individual blocks into different districts, we're not going to be able to run the election at least in presidential years . . . if you take a block out of a district and put it in an adjoining district that might be okay, but it's very likely that the House may take their districts and draw between the two, so we can't put that block in either precinct . . . in which case, what are we going to do, take that block and declare it a precinct . . . we beg you, don't divide precincts . . ." (transcript at 5). The State found this testimony significant in developing its nondiscriminatory criteria.

The practical problem involved in dividing precincts is that the board of elections must either divide the precinct along the district line to create two precincts (often impossible in rural areas be-

cause of a lack of polling places), or administer it as a split precinct.

In a split precinct, the district of each voter within that precinct must be identified, and the card marked. All new voters registering thereafter must not only be assigned to the correct precinct, but to the correct district within that precinct. This added layer slows down the voter registration process, burdening registration drives for minority voters. In addition, on election day, there must be for that precinct as many different sets of ballots and machines as there are combinations of districts within that precinct. That will slow down the voting process in these precincts, thus depressing black turnout.

The ACLU sees no problem with the increasing division of precincts. Yet, if a county is divided below the precinct level for Congress, House, Senate, commissioner, school board, and superior court judge, there exists the mathematical possibility that a precinct could require 64 different combinations of ballots and machines. While this is an unlikely event, it is certainly a valid non discriminatory reason to want to avoid splitting precincts.

The State's interest in dividing precincts is not minimal at all. It is of crucial importance to administering the election. To the extent that divided precincts tend to occur most often in areas with heavy black population, it will complicate the voter registration and election process in these precincts, reducing minority turnout.

Further, the citation to Jeffers v. Clinton on page 17 of the ACLU comment is not on point. The ACLU cites that case for the conclusion that ". . . the fact that alternative districts cross county lines or split cities or other geographic units does not relieve the state of its obligation to create additional majority

black districts." In fact, what the district court said was: "The one person one vote rule inevitably requires that county lines and natural barriers be crossed in some instances, and that cities and other political or geographical units be split in others." (Jeffers v. Clinton, 730 F.Supp. 196, 207 (E.D. Ark 1989), aff'd mem. 112 L.Ed. 2d 656 (1991), emphasis added.)

Furthermore, a criteria of not dividing precincts helps to satisfy the Gingles compactness requirement. As enunciated in Dillard v. Baldwin County Board of Education, 686 F.Supp. 1459, 1466 (M.D. Ala. 1988), the district is not compact if its members and representatives could not easily tell who actually lived within the district. To the extent that whole precincts are used, residents of the district and persons elected to represent the district are more likely to know who actually lives in the district. To the extent that the ACLU insists that percentages be increased by dividing precincts, candidates and voters are less likely to know who is in the district, and the district is less likely to have effective representation.

¶24A) Southcentral North Carolina . . . the only new majority minority districts created in Southcentral North Carolina under the State's plan are Districts 85 and 87 . . . alternative plans presented by the ACLU/NAACP/SRC and by Rep. Pope created a third majority/minority district in the area. The ACLU/NAACP/SCR plan (drawn on the State's computer) combined parts of Union, Anson, Montgomery, Richmond, Scotland and Hoke Counties to create a 53.38% Black district . . . Rep. Pope presented a similar district with a 51.6% BVAP. The second objection, that the Voting age population was too low to give black voters a realistic opportunity to control the outcome of the elec-

tion, ignores the fact that both ACLU/NAACP/SRC and Pope had limited computer time. (ACLU page 18)

Neither the ACLU/NAACP/SRC nor Pope presented any evidence to satisfy any of the prongs of the Gingles case that would lead to the conclusion that the Voting Rights Act requires a majority-minority district in this area of the State. This reply has already demonstrated that the ACLU/NAACP/SRC did not have their computer time limited, but merely stopped participating in the process. The claim that Pope had limited computer time is disingenuous, he in fact had lengthy access to the computer system, and the ACLU even claims in its comment that the Republican incumbents were ". . . the only people with extended access to the computers." (ACLU page 5)

The ACLU purports to get three minority districts out of the area by proposing that Robeson County be a two-member majority/minority district, and then using black and Indian population in Hoke and Scotland as part of another district. Another problem with their plan is that they assume cohesiveness between Blacks and Indians in their two member district, a fact that is conclusively refuted by the public meeting testimony of the two groups with regard to their competing demands for House districts, the Indian groups wanting to retain a multi-member district and the blacks wanting single-member districts in Hoke/Robeson/Scotland. Further, election statistics submitted with the congressional plan show lack of cohesion between black and Indian voting groups. Based on a legislative determination that the three member district needed to be broken down to allow an Indian and black district, the ACLU plan is inconsistent with the legislative plan.

The ACLU/NAACP/SRC southcentral district, which appears in Exhibit 12 of the ACLU comment is so

uncompact and convoluted that there is no sense of community, its members and its representatives could not conveniently stay in touch with each other, and its members and representatives could not easily tell who actually lived within the district. It stitches together dozens of disconnected black concentrations. According to the handwritten note on the Exhibit, it is built at the block group level, no information is attached as to electability of black candidates within the district, what communities it consists of, what political organizations exist within it, or any other information necessary to evaluate the district. The Pope district proposed for this area and shown as Exhibit 27R-4 in the submission is similarly uncompact, and no evidence was presented as to the electability of black candidates in that district.

I again reiterate that there is no evidence that in either the ACLU or Pope plan that minorities could elect a representative of their choice in the south-central area, nor are any other prongs of the Gingles case met. Further, there is only comment of one person at one public hearing, who focused mainly on county commission districts, concerning a minority district in this area.

¶25) Central North Region . . . no majority black districts were drawn by the State in Northern N.C. West of Granville County . . . Rep. Pope proposed an additional majority black district in the North Central portion of the State, encompassing parts of Alamance, Caswell, Granville, Orange, Person, and Rockingham Counties (District 25)[.] The district is 61.24% BVAP. No serious consideration was given to this district by the State . . . the State adds the charge that it is "extremely sprawling, uncompact and irregular" . . . As *Jeffers v. Clinton* makes clear, that alternative plans split . . . geographic units does not relieve the state of its obligation to create

majority black districts. The question is whether the alternative districts are "materially stranger in shape than at least some of the districts contained in the present apportionment plan. If they are not, they cannot be rejected on this ground. Here, several of the districts adopted by the state are equally "strange", so the State's argument is not only made of whole cloth, but fails the legal test as well. The lack of black support for the actual plan is likely the result of the exclusion of the black community from any meaningful ability to participate in the reapportionment process after the close of the hearings . . . as demonstrated by the petitions of members of the black community in Alamance County . . . black citizens, now that they have been appraised of the possible district, wish it to be drawn. (ACLU page 19-20)

The ACLU misrepresents the facts and the law here. Gingles requires that a district be geographically compact in order to satisfy one of the prongs of the initial test. As best enunciated by the district court in Dillard v. Baldwin County Board of Education, 686 F. Supp. 1459, 1466, (M.D.Ala 1988). "A district would not be sufficiently compact if it was so spread out that there was no sense of community, that is if its members and its representatives could not effectively and efficiently stay in touch with each other, or if it was so convoluted there was no sense of community, that is, if its members and its representatives could not easily tell who actually lived within the district."

The computer description of the contents of District 25 in Pope's plan (Exhibit 8) takes up 92 pages, in comparison, the computer description of all 95 districts of the State enacted plan takes up 191 pages. District 25 as noted by ACLU consists of parts of six counties. But it consists of 7 whole precincts and parts of 47 other precincts, as follows:

COUNTY	PARTIAL PRECINCT	WHOLE PRECINCTS
ALAMANCE	8	1
CASWELL	7	4
GRANVILLE	4	0
ORANGE	9	0
PERSON	11	1
ROCKINGHAM	8	1

As seen by the map of District 25 attached as Exhibit 9, the district is in fact so spread out that there is no sense of community, that is its members and its representatives could not effectively and efficiently stay in touch with each other, if it was so convoluted there was no sense of community, that is, its members and its representatives could not easily tell who actually lived within the district. The State has not divided any black community in creating its districting plan in the north central part of the State, it has merely failed to combine together a hodgepodge of little pockets of black population to create an ungainly allegation of a district.

District 25 includes a 2 mile stretch of the Haw River, as an example, to connect two parts of the district, (Exhibit 10), and contains dozens of tentacles. If the language in Gingles means anything, this black population is not "sufficiently geographically compact", and this area of the State has no "clear" violation of Section 2.

The ACLU has failed in its plan to show proof of satisfaction of any of the prongs of the Gingles test in this district. Ludicrously, the district even contains parts of nine precincts from Orange County, a county that is the core of a predominantly white district that currently has elected a black Senator, and has the lowest incidence of racial block voting of any county in the State. In the Gantt-Helms race,

using the same methodology in paragraph 17 of this reply, page __, 66.58% of the white voters in Orange County voted for Gantt.

Although the ACLU states that its Exhibit 15 in its comments contains signatures from residents of Alamance County asking for this district, there are no such signatures contained in its Exhibit 15. No such petition was given to the General Assembly.

The ACLU has shown no violation of Section 5 or Section 2, no support for the district, and it is totally uncompact. This District fails the compactness tests of Gingles and Dillard, and creation of this district is not required. As to the Jeffers test, the district in fact is materially stranger in shape than some of the districts contained in the enacted plan. Pope's district 25 has been attached as Exhibits 9 and 10, attached as Exhibits 11 and 12 are maps of the State's districts 6 and 16 (attacked by the ACLU as being as strange as Pope's district 25, ACLU page 19) District 6 in the State's plan is composed of whole precincts and is quite compact, District 16 is the predominantly white area that wraps around the predominantly black/Indian districts of Hoke, Robeson, Scotland, and Cumberland. It was designed to consist of the remainder of Hoke, Scotland, and Robeson Counties, which had been the three member district, plus added population as required by one person one vote. In fact, the part of Moore County in the district was part of Hoke County until 1951. Acquisition by the military of land in Hoke County for Ft. Bragg had cut off that township from the remainder of Hoke County, and it was moved to Moore County to allow access to services. District 6 is entirely 22 whole precincts, District 16 has 24 whole precincts and one divided precinct.

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¶32) As evidenced by the plans submitted to the Senate reapportionment committee on May 14, 1991, two majority black districts can be drawn in the area stretching from Anson County to Pender County . . . the first proposed district starts in Anson County, and includes portions of Richmond, Scotland (all), Hoke, and Robeson Counties . . . the district is 30.7% Black, and 27.97% Native American . . . the second district could have been drawn preserving the Fayetteville District . . . Attached is an alternative configuration [which] has a black population of 52.04%, and a native american population of 5.82%, for a combined majority/minority district of 57.86% . . . this district is drawn at the township, VTD, and tract level . . . so the racial composition could be dramatically improved using a computer. Such a district was proposed by Senator Daughtry. Under his plan, another majority black district is drawn east of the State's District 30, consisting of parts of Bladen, Brunswick, Columbus, Duplin, New Hanover, and Onslow Counties, at 52.26% black, using whole precincts. The state gave two reasons for rejecting this district: the racial composition (too low), and its shape (uncompact). Neither of these reasons is valid. The black population could easily be increased by going to the block level, thereby creating an effective black voting majority . . . as to the charge that it "sprawls all over southeast N.C. . . . several of the districts drawn by the legislature in Northwestern N.C. sprawl as well, for example District 27. (ACLU page 28-30)

As to the Anson, Richmond, Scotland, Hoke, Robeson District, which ACLU cites with a minority population of 30.7% black and 27.97% Native American, staff analyzed that plan, and found that the actual percentages were 30.54% black and 28.57% Native American, for a total of 59.11%. In the enacted plan, District 30 is 27.87% black, and 33.07% Native American, for a total of 60.95%. This reply has previously noted there has been no conclusive

evidence of voting cohesion between the blacks and Native Americans, but even if there was such evidence, the State's enacted plan has a higher combined black/Native American population in the southcentral district than does ACLU. Presumably, this district is only proposed if the southeast "minority" district, which would include parts of Robeson County, was created.

As to the Daughtry districts in the Southeast, Daughtry proposed two different versions of the district in DAUGHTRY SENATE PLAN 6/17/91 and DAUGHTRY SENATE PLAN 7/1/91. In those two plans, the black populations were 52.26% and 52.65% respectively, and the black voting age populations were 48.71% and 40.53% respectively (the second plan includes military populations in the "minority" district). Both plans do go below the precinct level in Sampson County. Neither Daughtry plan included any evidence that a minority candidate could be successful in this district, nor that there was enough compactness to meet the Dillard test. No evidence has been shown beyond conjecture about further going below the precinct level. In addition, as pointed out above, the more a district goes to the block level, the harder it will be for a rural black area to organize a campaign. This is clearly one of the reasons for the compactness requirement enunciated in Gingles and Dillard.

Attached as Exhibits 14, 15, and 16 to this reply are District 27 in the enacted plan, and the southeast minority districts in DAUGHTRY SENATE PLAN 6/17/91 and DAUGHTRY SENATE PLAN 7/1/91, to show the compactness. The Daughtry Senate districts are "materially stranger in shape than at least some of the districts contained in the present apportionment plan," and this fails the Dillard test. In addition, if, as ACLU suggests, these districts can

have their minority percentage "improved" by going to the block level, they will quickly become even more materially stranger in shape.

As to the plan shown in Exhibit 18 to the ACLU comments, the district shown on the map is not the actual shape of the district, note the first page of the exhibit, "the map shows the district minus the Robeson County component." I was unable to recreate the entire district to show you a map of its shape, because some of the census terminology in Sherman's report was unintelligible to us, such as DUPLIN COUNTY TR 3706191060/9999999 2 population 1817. I could find no tract or block group with such a population. I have mapped the Robeson County portion of the Sherman district, and put it together with the map ACLU attached to be Exhibit 17 in this reply. Note comparing just the Columbus and Bladen parts of Sherman's district, which I was able to build, with Sherman's sketch in ACLU exhibit 18 that the ACLU had significantly "smoothed out" the shape of their map from its actual shape in trying to prove it did not "sprawl all over". It is materially stranger than District 27 which the ACLU cites in its report.

In fact, none of the discussion by the ACLU about any of the southeast Senate districts touches on many of the legal issues required. There is no discussion of minority electability, no discussion of cohesiveness of the district. The district fails the Dillard test that "A district would not be sufficiently compact if it was so spread out that there was no sense of community, that is if its members and its representatives could not effectively and efficiently stay in touch with each other, or if it was so convoluted there was no sense of community, that is, if its members and its representatives could not easily tell who actually lived within the district."

¶33) Northeastern North Carolina . . . again, the configuration chosen by the Legislature precluded the creation of another majority black district in North Carolina . . . three majority black districts can be drawn where the North Carolina legislature drew only two, see Daughtry Senate plan, Districts 1 (56.7% Black), 2 (55.62% black), and 3 (58.24% black), compare with Senate Districts 2 (59.39% black) and 6 (59.23% black) . . . the only justification given by the State for not adopting three black districts was that the voter registration numbers were too low to give black voters a reasonable assurance of electing representatives of their choice . . . However, as noted above, these districts were drawn at the precinct level, and could therefore have been made into electable districts by going to the block level. More fundamentally, when the racial compositions of Daughtry's three districts are compared with the two districts adopted under the Senate plan, the differences are minimal. (ACLU page 30-31)

In the enacted plan, black voter registration is 54.95% in District 2, and 53.31% in District 6. In Daughtry's Plan, the percentages for Districts 1, 2, and 3 are 52.33%, 50.88%, and 52.61%. The differences between these percentages, which are so close to 50%, are not minimal. Senator Ballance expressed his concern with the low percentage of black registered voters in his district (S-28F-3, transcript pages 38-40) stating "Senator Daughtry I'm . . . here . . . to point out what I think are some problems with it, even though you have the first six districts, I believe, majority populations would be Black . . . When you turn over to the next page and look at the Senators in those districts is where I have a problem . . . in District 1, the registered black voters would be 52 percent . . . And then you go to District 2 where I believe would cover my current county — and I am not here to protect myself — but that percentage drops down to 50 percent, 50.8. District 3 is

52.6 . . . we do have to pay a lot of attention to the numbers, and that is the registered voters that we have in the district as we draw these districts . . . I think its important as to whether or not we're going to latch onto this plan, simply because it draws six districts which would be majority black districts . . . I don't think that's the test. I think the test is whether or not, No. 1, whether they can be elected in that district . . ."

Ballance, who was elected in a district created as a result of the Gingles case, clearly felt black candidates would have difficulty winning in the three "minority" districts proposed by Daughtry. Ballance voted against Daughtry's plan, and for the enacted plan. As an expert on voting patterns in the Northeast, he is a much better judge of electability of blacks than simply using Senator Daughtry's assertions that the three districts are "minority districts" as proof.

Daughtry has shown no evidence, in fact, that any of his three Northeast districts are likely to elect a black Senator. Numbers that would be sufficient in urban areas are not sufficient in rural areas.

¶34) Senator Daughtry responds . . . Senator Winner says that my plan has either too many blacks in the plan or not enough blacks in the plan . . . All I can tell you is that each of the nine districts has the criteria of over 50% registration, voting age and population." (ACLU page 31, fn 24)

In fact, district 6 (southeast) in Daughtry's Senate plan does not have 50% black voting age population, and district 7 (south central) does not have 50% black census, VAP, or voter registration. Daughtry's answer seems to indicate a misunderstanding of Winner's position that different percentages are

needed in urban versus rural areas to be an electable district, thus the same percentage could be packing in an urban district, and insufficient in a rural district. Daughtry's plan and the testimony on it before the committee seems to give no indication that the question of minority electability was considered. Rote repetition of statistics proves nothing.

There is no evidence in the record of any support by black persons of Daughtry's plan in the Northeast.

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¶36) Low racial compositions . . . five of the six majority black Senate districts drawn by the legislature were drawn at percentages lower than reasonable alternatives proposed by minority groups and/or Republican members of the legislature . . . (ACLU page 32)

The fact that other plans had a higher percentage racial composition than that of the plan enacted by the General Assembly proves nothing. The question is whether the plans enacted by the General Assembly allow blacks to elect a representative of their choice in the district. Percentages higher than that, while they may be legally permissible unless they amount to packing, nevertheless reduce minority influence in other districts. A legislative goal to maximize minority influence in other districts after ensuring black election in the minority districts surely is not an impermissible goal. Each specific district will be discussed in the following paragraphs.

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¶40) District 41, Fayetteville, newly created at 43.31% black (55.4% black registered voters) was drawn under the Daughtry plan to include minority black sections of Harnett and Wake Counties, for a total black population of 56.08% (ACLU page 33)

District 41 was drawn by the Senate Committee to mirror House District 17 in the plan enacted in 1982. As the Justice Department suggested in its 1982 objection, the military base with its small number of registered voters could be coupled with the heavy black concentration of voters in Cumberland County to create a compact, cohesive majority/minority district. A similar House district has over the last 10 years consistently elected black candidates.

The committee saw no need to stretch a district from Fayetteville through Raleigh. It chose instead to create the District in Cumberland County, and moved Raleigh's black community from a three member district 14 to a two member district 14, thus increasing black political influence. In Wake County as a whole, black candidates have had little trouble winning countywide elections. District 14 is 27.25% black population, and 33% of the registered Democrats are black. Gantt received 57.77% of the vote for the U.S. Senate in enacted District 14. Currently, of the 11 countywide elective non-judicial offices elected on an at-large basis in Wake County, two of the seven members of the Board of Commissioners are Black, the Sheriff is Black, and the Register of Deeds is Black. To amplify the black electoral impact beyond that of the countywide information from the preceding sentence, District 14 excludes 31 predominantly white precincts from Wake County, and includes two predominantly white precincts in Johnston County.

In the 1988 General Election, candidate for Wake County Commissioner Vernon Malone (D/b) received

57.34% of the vote in the area to become Senate District 14 against a white Republican. (since there were no black candidates in the two Johnston County precincts, Gantt/Helms totals from 1990 were used in those two precincts) see Attachments S-28D-1 and S-28D-2(a), and Attachment S-28D-3(a) for voter registration totals.

In the 1990 Democratic Primary Election, candidate for County Commissioner Abe Jones (D/b) received 52.16% of the vote in the area to become Senate District 14 against two white candidates (since there were no black candidates in the two Johnston County precincts, Gantt(b)/Easley(w) totals from the 1990 Democratic primary were used in those two precincts) see Attachments S-28D-1 and S-28D-2(b), and Attachment S-28D-3(b) for voter registration totals.

In the 1990 General Election, candidate for County Commissioner Abe Jones(D/b) received 59.38% of the vote in the area to become Senate District 14 against a white candidate (since there were no black candidates in the two Johnston County precincts, Gantt/Helms totals from 1990 were used in those two precincts) see Attachments S-28D-1 and S-28D-2(c), and Attachment S-28D-3(c) for voter registration totals.

In the 1990 General Election, candidate for Sheriff John Baker(D/b) received 68.47% of the vote in the area to become Senate District 14 against a white candidate (since there were no black candidates in the two Johnston County precincts, Gantt/Helms totals from 1990 were used in those two precincts) see Attachments S-28D-1 and S-28D-2(c), and Attachment S-28D-3(c) for voter registration totals.

In the 1990 General Election, candidate for United States Senator Harvey Gantt(D/b) received 57.77% of

the vote in the area to become Senate District 14 against Jesse Helms(R/w), see Attachments S-28D-1 and Attachment 28D-1 in the House submission, and Attachment S-28D-3(c) for voter registration totals. As noted in the summary for Section S-28D in the Senate submittal. Thus, the plan chosen by the legislature creates a district in Cumberland County where a black will be elected, and creates District 14 as part of Wake County where minorities will have an equal opportunity to elect candidates of their choice.

There is no legal requirement to create a Cumberland/Harnett/Wake district in place of the Cumberland district enacted by the General Assembly.

¶41) The alternatives proposed for each of these five districts not only increase the black percentages in each of the districts — but also increase the number of counties in which the black community will be included in a majority black district. The black populations in each of the following counties could have been, but were not, included in fairly drawn majority/minority districts [list of 20 counties] (ACLU page 33)

There is no legal requirement to maximize the number of counties where black communities are in black districts. There is no positive correlation between the number of counties in a district and the amount of compliance with Sections 2 and 5. Indeed, the greater number of counties in a district, the less likely there is to be any community of interest, and the more likely a district is to be uncompact and unrepresentable, failing the Dillard test.

¶42) Under the reapportionment plan drawn by the legislature, there is only one majority black (55.69% black) Congressional district, despite the fact that blacks constitute 22% of the state's population. Further, the substantial black and Native American populations in the

Southeast were fragmented among three different congressional districts: Districts 3, 7, and 8 . . . many of black citizens who appeared at hearings throughout the state requested that a 2nd black congressional district be drawn . . . at least three alternative plans were proposed, each of which drew *two* majority black districts . . . Under Balmer 6.2, the second district (Southcentral is 48% black/8.3% Indian. Under Balmer 7.8, the North/Central district is 55.4% and the Northeast to NorthCentral district is 53.3% black . . and under Balmer version 8.1, District 2 (northeast to northcentral is 58.5% black, while the second district 12 (notrthcentral [sic] to Charlotte) is 56.8% black . . . None of the alternative plans were, however, circulated for public comment. There was also extensive criticism of the public access procedures for computer time . . . the primary reason given by the State for not adopting any of the alternative, 2 minority Congressional plans was that it dramatically decreased black influence in Districts 4, 7, 8, and 9 . . . protection of white Democratic incumbents is not a valid reason for refusal to create a majority minority district . . . A second reason is that the district is "too sprawling and uncompact" to allow for effective campaigning or representation . . . However, compactness was not among the criteria adopted by the Congressional Redistricting Committees . . . nor can the term compact be used to describe the final plan adopted by the legislature . . . a third reason is equally pretextual . . . there is no real community of interest among black citizens of the district . . . finally, the single majority black district adopted by the legislature has a racial composition of only 55.7% black (51.34% B Reg. given voter registration and turnout histories in North Eastern, N.C., a 56.7% black district may not be an electable one. Carolyn Coleman offered an alternative plan . . similar plans were proposed by the N.C. Black leadership Caucus . . . (ACLU page 34-37) The boundary lines of the congressional districts . . . divide black population concentrations in a manner that neutralizes black voting potential in the State (Balmer page 1)

There was no expressed black support for BALMER 6.2. BALMER 7.8 was not even introduced until the day the second House adopted the conference report on the enacted plan. BALMER 8.1 was not created until after the enactment of the Congressional redistricting plan, was not even noticed formally by the State until it was seen in the process of reviewing the Justice Department comment file on this submission, and referenced in the ACLU comment page 35, although Representative Balmer may have placed a copy of the plan in the legislative library in August. The ACLU is incorrect if it states that the General Assembly received three plans from Representative Balmer as part of its consideration of the plan.

The State did not divide black population concentrations in enacting the plans. It at most failed to put together dispersed black population centers. No black community was divided, the plan took pains to avoid that result.

The ACLU states that limited computer time prevented alternative plans from being created, yet it presents three different alternate plans. The entire legislative process resulted in only six different plans being presented by the legislative leadership.

No expert evidence was shown in any of the Balmer plans, nor in any of the alternates, of the electability of black congressional candidates in the alternative districts. For the question of electability in the First Congressional District in the enacted plan, the State had the collective knowledge of black legislators from the Northeast, all of whom were familiar with the area, including Representative Toby Fitch, co-chair of the committee, who had worked in the 1972 Second Congressional District

campaign of now Senator Howard Lee (B), and Representative Mickey Michaux, who had been an unsuccessful candidate in that district in 1982. Representative Fitch was responsible for the initial decision on the conceptual design of the plan going into Jones and Craven counties, as the Second Congressional district had done in the post-Civil war area. Statistics available to the committee showed that Democrat Harvey Gantt received 62.2% of the vote in the enacted district. The different variations of the First Congressional District that appeared in PLANS #1 through #6 were all examined by black legislators, and not one negative comment was received about any problem of electability of black candidates under the plan.

The State also had the historical advantage of knowing the configuration of the Second Congressional District after the Civil War, when black candidates were elected to serve the second district. Attached as an example is Exhibit 18, a map of the Second Congressional District from 1883-1891. Congressional Districts were redrawn in 1901, allegedly to eliminate the opportunity for minorities to serve in Congress. Note that the district <u>is similar</u> to the First Congressional District in the enacted plan. Every county in the Second Congressional District in the 1883 plan, which stretched from Vance County down into Jones and Craven Counties, appears in whole or in part in the 1991 plan. The area of the enacted First Congressional District and the pre-grandfather clause Second District share historical political connections.

Additionally, substantial and compelling evidence shows that minority voters have an equal opportunity to elect candidates of their choice in the Fourth Congressional District in the enacted plan. Some evidence also shows that minority voters have an

equal opportunity to elect candidates of their choice in the Ninth Congressional District in the enacted plan, but it is not nearly as conclusive and is not recited here.

In the Fourth Congressional District, Gantt received 58.16% of the vote, with a black voter registration of just 16.41%, compared with the 62.2% in District 1 which has a 51.34% black voter registration. Wake County, which has four black constitutional officers elected countywide at-large (sheriff, register of deeds, two county commissioners), has had a State Senator elected at-large, and the Speaker of the House is a resident of Wake County. (see further discussion in paragraph 40 of this reply)

Wake County has 76.5% of the population of the district and 75.75% of the registered voters. The plan includes all of Wake County except one precinct where Gantt received just 18.68% of the vote, his worst showing in the county. Gantt received a majority of the white vote in <u>38</u> predominantly white precincts in Wake County. In fact, Gantt received a higher percentage of votes from white voters in Wake County than he did in his home county of Mecklenburg. In Wake County, Sheriff John Baker (D) is currently in his fourth term, and the progression of election returns seen in the newspaper article from the <u>News & Observer</u> of October 13, 1991 (Exhibit 19) show the lack of racial block voting in Wake County, and the dramatic change since the <u>Gingles</u> findings. In the 1978 election, contemporaneous with the <u>Gingles</u> findings, there was racial block voting. But by 1990, Baker was carrying 99 of the 100 precincts, carrying rural precincts by a 2-1 margin that Gantt lost the same day. This reinforces not only the thesis of equal minority opportunity in the Fourth District, but also buttresses the rebuttal to the ACLU claim that the Gantt vote was not only

unusual but also overstated. The Gantt vote in fact is quite representative, if not an understatement of the electability of local black candidates in the areas that this reply and the submittals use the Gantt statistics as evidence of equal opportunity.

Orange County, which has had a black elected county commissioner at-large continuously since 1972, elected a black mayor in predominantly white Chapel Hill in 1969, 1971, and 1973, and has elected a State Senator from a predominantly white district, makes up 15.22% of the population and 16.64% of the population. The plan excludes in Orange County from the Fourth Congressional District five precincts in which Gantt received a smaller percentage than the county average. Chatham County, which has had a black county commissioner elected countywide for the last three terms and is located in a predominantly white Senate district which is represented by a black Senator makes up 3.1% of the population of the district and 3.5% of the registered voters, and of the 10 precincts from Chatham County in District 4, seven had more than the countywide average percentage of votes for Gantt. Additionally, Gantt's opponent, Jesse Helms, is a resident of Wake County, which might have given Helms and [sic] advantage in Wake County.

All this evidence indicates that blacks have an equal opportunity to elect candidates of their choice in the Fourth Congressional District, thus showing at least two such districts in the enacted plan (1 and 4)[.] The alternative plans have at best two such districts. Even assuming that two minority districts are required, and assuming that the alternative plans show two minority congressional districts that meet those requirements, then both they and the enacted plan are in compliance with the Voting Rights Act.

The ACLU alleges that compactness should not be considered because it was not an adopted criteria, and because the term compact "cannot be used to describe the final plan adopted by the legislature." This begs the question. If a district must be compact in order to meet the compactness tests discussed in Dillard and Jeffers in order for it to be required under the Voting Rights Act, it does not matter if compactness was not a criteria adopted by the committee. In addition, it is clear that the alternative districts proposed in the three Balmer Plans are all materially stranger than those adopted by the legislature. See Exhibit 20 for the three maps. In Balmer 7.4, the eastern "minority" district is clearly stranger than anything in the enacted plan. It is not sufficiently compact as it is so spread out that there was no sense of community, its members and its representatives could not effectively and efficiently stay in touch with each other, and it is so convoluted there was no sense of community, that is, if its members and its representatives could not easily tell who actually lived within the district. (Dillard) The same can be said about the southern "minority" district in Balmer 6.2, which as previously noted here and in the submittal, is not a minority district as no evidence has been submitted about the cohesiveness of voting between black and Indian voters. Both minority districts in Balmer 8.1 fail the compactness tests. The western "minority" district (12) defies imagination, stretching for 125 miles from Charlotte to Caswell County, never being more than five miles wide, and for considerable stretches appearing from the map with Balmer's August 5, 1991 submittal to be a mile wide or less. It then arcs in a curve another 50 miles into Durham. Along the way, it has tendrils into Winston-Salem, Reidsville, and Burlington. It would be preposterous to say that this district is compact.

The ACLU insists that the reason for rejection of the alternative plans by the legislature was that they would decrease black influence. While this was certainly a factor, some other reasons were the sprawling uncompactness, and the sense that they [did not] show[] minority electability.

Taking all this evidence as a whole, there is no discriminatory purpose in the enacted Congressional plan. There is no retrogression from the existing plan, indeed, the ability of minorities to elect candidates of their choice caused by the reconfiguration of the First and Fourth Congressional Districts has improved this ability. Also, the evidence shows there has been no discriminatory effect in the plan.

¶43) each of the plans was intended to dilute minority strength . . . reapportionment plans are also objectionable under Section 5 where there is evidence that the legislature intentionally discriminated against its minority voters in drawing new districts. In North Carolina, all three of the plans are infected with such a racially discriminatory purpose . . . the purpose behind each of the plans was the protection of the Democratic majority in North Carolina . . . districts that admittedly could have been drawn were not, and racial majorities in existing districts were reduced . . . so that black voters could be used to protect Democratic incumbents . . . the justification for both actions . . . is that the legislature felt that black voters had more influence overall with fewer black districts (ACLU page 38)

The ACLU has failed to show any proof of any racially discriminatory purpose. Perhaps the best synopsis of the non-racially motivated reasons for adoption of the plans was stated by Senator Ballance in the Senate Public hearing, S-28F-3, transcript pages 37-40, when he stated:

"I believe that the goal of these districts is not only to have black representation, but to have effective representation in the Senate and the House, in the Senate in this case. I say that, because I don't subscribe to a separate party. And if we are to — to have blacks in the Senate— we now have five, I think — I think they are effective. If we are to draw districts as are put in Senator Daughtry's plan, I'm not sure how effective they may be. One of the things that we know is that in the Senate, you have to have at least 26 votes, if everybody is home, in order to pass a bill. And six Senators can't pass a bill . . . the other thing I would say is this . . . if I'm going to accept, per se, a plan drawn by the [R]epublican party, I'd like to have some indication that the — that the people who present this plan are prepared to support me on some of my bills. And I use me as an example to talk about other bills that may be out forward by Blacks. And I right now don't see a history of that occurring in the Senate and maybe in the House, too . . ."

The General Assembly in enacting the plan looked carefully at what percentages of votes were necessary to elect minority candidates in various districts. In a policy choice to maximize minority influence, as noted by Senator Ballance, the General Assembly did not pack districts, it instead attempted to maximize minority voting strength after creating the majority/minority districts it felt were required by the Voting Rights Act. As you will see from this reply, much history of election results of black candidates was available to the General Assembly. The clock did not stop with the Gingles case, progress in black voter registration and increased likelihood of white voters supporting black candidates led the General Assembly to a reasoned, case by case analysis of each district.

Even if it turns out that the General Assembly did not correctly apply Section 5 and Section 2 in every case, it cannot be said that there was any discriminatory purpose involved in the legislative action. Legislators, with similar perspectives as those enunciated by Senator Ballance, looked at examples such as the "minority district" plans put forth in the H119(V2) and DAUGHTRY plans, and alternative Congressional plans, and saw, as outlined in paragraph 15 of this reply, the same coalition that supported H199(V2) as an amendment on the House floor, oppose HB776 on the House floor, a bill to set up single-member school board districts in Forsyth County. HB776 was supported heavily at a public hearing by speakers from the black community, with information provided about the electability of minority candidates in those districts, and the lack of success of minority candidates under the existing school district plan.

No testimony was provided about the electability of minorities under the H119(V2) or DAUGHTRY SENATE PLANS, or any of the alternate Congressional plans.

If there are allegations of partisan gerrymandering in this part of the ACLU comment, these are not considerations under Sections 2 or 5.

* * * *

¶46) The congressional plan . . . the protection of incumbents, particularly white democrats, was the goal of reapportionment . . . Senator Winner expressly stated that the primary goal of the Congressional plan was to keep each of the incumbents in his own district, C-28F-6(m) subcommittee meeting of May 29, 1991, page 4 . . . creating a second black district would have harmed the Democratic incumbents . . . Willy Lovett said . . . when people . . . get elected, we don't seem to get the representation . . . By drawing only one majority black district, the plan protected the Democratic incumbents in the 7th and 8th districts . . . instead, the legislature drew only one majority black district, thereby intentionally diluting black voting strength . . . (ACLU page 41-42.)

Winner did not "expressly say that the primary goal of the Congressional plan was to keep each of the incumbents in his own district" as alleged by the ACLU. He merely stated "we tried to keep all the incumbents, Democrats and Republicans, from ending up in the same districts." Nowhere was it stated that this was the primary goal.

ACLU presents no evidence that any of the alternative plans would actually elect a minority candidate to the "second minority" congressional district. As discussed previously, the alternative proposals do not meet the Dillard test of compactness. In fact, there is really no conclusive evidence that the Voting Rights Act required any predominantly black congressional district to be drawn, but legislative leadership decided early on that there would be a Congressional district in which minorities would be able to be elected. Note in paragraph 42 of this reply substantial and compelling evidence that in the Fourth Congressional District, minorities have an equal opportunity to elect candidates of their choice.

In fact, as to minorities being able to elect candidates of their choice, once a minority congressional district had been created, it could indeed be a valid non discriminatory policy purpose to create as many districts as possible in which minorities can elect a candidate of their choice. An analysis of congressional voting records bears this out. The Leadership Conference on Civil Rights rated the 100th Congress (1978-88) on Civil Rights Voting Record (Exhibit 21)[.] The ratings of the Democratic and Republican Members of Congress are listed below:

Democrats	
Jones	**87**
Valentine	**100**
Lancaster	**87**
Price	**93**
Neal	**80**
Rose	**87**
Hefner	**87**
Clarke	**80**
Republicans	
Coble	**20**
McMillan	**27**
Ballenger	**20**

Examining similar votes (Exhibit 21) for the 101st and 102nd Congress (1989-91) on issues relating to the Civil Rights Restoration Act, Fair Housing Amendments, King Holiday Commission, Hate Crimes Statistics, Civil Rights Act of 1990, and Civil Rights Act of 1991, a comparable rating would be:

Democrats	
Jones	**100**
Valentine	**100**
Lancaster	**100**
Price	**100**
Neal	**100**
Rose	**92**
Hefner	**100**
Republicans	
McMillan	**7**
Ballenger	**0**
Taylor	**0**
Coble	**0**

One could indeed argue that in the absence of the ability to create a second "minority" congressional district, the incumbent Democrats in fact were the candidates of choice of black voters.

The General Assembly did not intentionally dilute minority voting strength.

¶47) The role of black incumbents . . . with a few exceptions . . . most notable Rep. Herman Gist, the black incumbents in both the House and Senate supported and enabled the intentional discrimination contained in the three plans, in the name of protecting the Democratic party. Under such circumstances, the absence of opposition by incumbent black legislators to the pending plans cannot be taken as an indication of the plans' compliance with the Voting Rights Act. Rep Fitch . . . knew that additional black districts could be drawn, and deliberately chose not to draw then . . . Similarly, Rep. Green voted against alternative plans because he viewed them as helping the Republican Party . . . Senator Ballance explained his support . . . historically, the black Senators had always to rely on the Democrats to vote with them in order to get legislation passed . . . perhaps the most outrageous statement of all came from Rep. Micky [sp] Michaux (B) of Durham . . . under the Balmer plan . . . what you are actually doing is taking all the minorities and putting them in two districts and saying that you all have got what you want . . . now go about your business and leave us alone. (ACLU page 42-43)

There was no intentional discrimination in any of the three plans. It is relevant to take into consideration the support for the plans by black legislators in determining whether there was intentional discrimination.

ACLU has misread the Fitch-Rhyne colloquy. Rhyne asked Fitch if it was possible to draw a minority district in several areas in question. (28F-6(k), transcript pp 5-7) Rhyne had not presented any evidence about compactness, cohesiveness, or the ability of minorities to elect candidates of their choice in additional "minority" district[s] proposed by himself

or Representative Pope. The position apparently was based purely on the percentages involved anything over 50% was a "minority district". It is important to read Fitch's answer on page 5 "Well, neither the Voting Rights Act or the legislative history as we understand it state . . . that you have to draw every district no matter how noncompact that district night [sic] be in that particular area." Representative Fitch was well aware that the issue was more than population majority. Taking the position that the Republicans had failed to show that the district was required by the Voting Rights Act is different from acknowledging that it was a "minority" district. The colloquy shows no racially discriminatory purpose of Representative Fitch.

Indeed, from the very beginning of the process Fitch was very cognizant of the requirements of the Voting Rights Act. His first instruction to staff as the House districting process started was to ensure that all existing majority/minority remained such districts. He monitored this process with staff at frequent intervals, and was continually briefed by staff on these minority districts. Representative Fitch also examined with staff alternatives for other, new minority districts.

As to Representative Green, nothing in the transcript or record indicates that he voted against alternative plans "because he viewed them as helping the Republican party." He merely asked "why have you professed this interest in the minority districts . . . how does the Republican position stand in regards to this Plan versus the other one . . . what advantage does this Plan have for your party over the prior one?" Remember, as discussed in paragraph 15 of this reply, just the next day, 27 of the 33 votes for the Pope amendment came from Republicans who would the next day vote against HB776, a bill spon-

sored by two black representatives to set up districts for the Winston-Salem/Forsyth County Board of Education. That bill had been discussed in committee on July 3, 1991.

As discussed in paragraphs 33 and 43 above, Senator Ballance had been concerned that the Daughtry plan, far from adding an additional black district in the Northeast, would in fact threaten the electability of the one existing black district in the Northeast. This was certainly a valid reason under the Voting Rights Act to reject a plan. As to Ballance's comments about alliances, this political philosophy can hardly be held to be racially discriminatory.

The ACLU considers Michaux's analysis to be "outrageous". Representative Michaux, a former United States Attorney, had been a candidate for the Second Congressional District seat in 1982, winning the first primary but losing in a runoff. Michaux had been the member of the General Assembly whose continued electoral success had been the electoral success which the Supreme Court stated in Gingles did not require single-member districts in Durham. Certainly, his expertise requires some deference, and not just a dismissal as "outrageous". Michaux had been presented no evidence about minority electability in either of the two Balmer plans that had been under consideration. Although there had been some discussion at public hearings about the goal of having a second black district, Michaux clearly viewed Balmer's plan as threatening to minority political influence, when he said ". . . you are . . . saying you all have got what you want . . . now go about your business and leave us alone." These comments can hardly be used to show a racially discriminatory purpose, there [sic] were merely Mi-

chaux's political analysis of the impact on minorities of the Balmer plans.

Trying to maximize black influence in the legislature by having a mix of black representatives with white representatives who because of black constituencies are willing to form coalitions cannot be a racially discriminatory purpose even if one disagrees with the strategy.

To call the incumbent black legislators the enablers of intentional racial discrimination against blacks flies in the face of the entire record before you.

¶48) North Carolina cannot carry its burden of demonstrating the absence of racially discriminatory intent in the formulation and passage of each of the three pending plans. Moreover, each plan is itself in clear violation of Section 5 . . . we strongly urge you to . . . object." (ACLU page 44)

The evidence in the State's submittal and in this reply is to the contrary. The Attorney General should interpose no objection to any of the three plans before you.

Exhibit 26

[Excerpts from submission by State of North Carolina to the United States Department of Justice during preclearance process for Chapter 601 (first Congressional Plan)]

C-27R-3 Proposed Minority Districts

House/Senate/Cong: Congress
Author: Rep. Balmer
Computer Name: Balmer Congress 6.2
(and Block Level rev.)

Where and When Proposed:
House Committee—presented 6/3/91
PCS 6/21/91 (block)
6/25/91—House floor

Action taken: motion to adopt proposed committee substitute defeated (5-16)
floor amendment defeated (36-72)

Geographic Area involved:
1) Franklin—Pasquotank—Lenoir
2) Mecklenburg—New Hanover

Includes area covered by §5: yes

Percent Black VAP: #2 53.75%
#12 45.32%

Percent Black VR: #2—53.52%
#12-46.80%

Percent Am. Ind. VAP: #2 <1%
#12 7.50%

Percent Am. Ind. VR: #12—7.79% "other"

Black Legislators Who Supported: None [1]

[1] Although the House Committee vote on June 21, 1991 shows Rep. Barnhill voting in favor of this plan, he voted against it on the floor on June 25, 1991, and he says that he never supported this plan and did not intend to vote for it.

Notes: The block level refinement of this plan lowered the population deviations to one. It did not significantly affect black percentages.

Reasons why not adopted:

HOUSE:

1. Second "minority" district did not have effective minority voting majority.
2. Charlotte to Wilmington district, including 200 miles of both highly urban and highly rural voters, would have been impossible to represent well and very difficult to campaign in. Rest of plan also very uncompact.
3. Plan dramatically decreasd black influence in districts 4, 7, 8 & 9 as drawn under Charpter [sic] 601.

SENATE: Not presented to Senate for a vote.

C-27R-5 Proposed Minority Districts

House/Senate/Cong: Congress
Author: Rep. Balmer
Computer Name: Balmer Congress 7.4/
Balmer Congress 7.8

Where and When Proposed: Introduced as HB1310 on July 9, 1991.

Action taken: A motion to suspend the rules to allow early reading and assignment of committee when 1310 was filed on 7/8/91 filed (39-63). The House Congressional Redistricting Committee did not meet again after HB 1310 was assigned to it on July 9, 1991.

Geographic Area involved: #2 Nash—Pasquotank—Bladen
#3 Forsyth—Halifax—Wake

Includes area covered by §5: yes

Percent Black VAP: #2 —49.66%
#3 —52.59%

Percent Black VR (if whole precincts used): #2—54.11%
#3—53.03%

Percent Am. Ind. VAP: #2—0.47%
#3—0.71%

Percent Am. Ind. VR (if whole pcts used): #2—0.34%
#3—0.95%

Black Legislators Who Supported: none

Notes: District #2 has less that [sic] 50% black VAP but has the military bases in both Cumberland and Onslow Counties.

Reasons why not adopted:

HOUSE:

1. Not presented until too late.
2. District #2 is too sprawling and uncompact to allow for effective campaigning or representation.
3. The plan emasculates black voting strength in areas where blacks have been able to influence Congressmen (for example Chapter 601's 4th, 5th and 8th districts).

SENATE: Never presented to Senate.

C-27R-1 Proposed Minority Districts

House/Senate/Cong: Congress
Author: Rep. Justus
Computer Name: JUSTUS'S CONGRESSIONAL PLAN

Where and When Proposed: Draft presented at public hearing 6/13/91.

Offered in House Cong Committee on 6/21/91.
Offered as House floor amendment on 6/26/91.

Action taken: Motion to adopt proposed committee substitute defeated on 6/21/91. (7-16)
House floor amendment defeated. (28-78)

Geographic Area involved:
Alamance—Perquimons—Wayne/Greene

Includes area covered by §5: yes

Percent Black VAP: 52.55%

Percent Black VR (if whole precincts used): 51.12%

Percent Am. Ind. VAP: 0.64%

Percent Am. Ind. VR (if whole pcts used): 0.84% "other"

Black Legislators Who Supported: none

Notes: He has only one black district and it is not better than the black district in the adopted plan (51.12% black VR vs 51.34% black in Chapter 601).

Reasons why not adopted:
HOUSE: Did not improve minority representation (among other reasons)
SENATE: Not presented to Senate for vote.

C-27R. Other Material Concerning The Purpose Of The Plan

The purpose of the Committee chairmen in supporting the conference committee report for S.B. 16, which was then enacted and ratified as Chapter 601, was to enact legislation that redistricted North Carolina's congressional seats, including its new 12th seat, in a manner that was fair and legal and in compliance with the criteria that had been adopted by the committees.

Among other goals, the Chairman tried to keep precincts whole, to avoid dividing counties into more than two districts, and to give black voters a fair amount of influence by creating at least one district that was majority black in voter registration and by creating a substantial number of other districts in which black voters would exercise a significant influence over the choice of congressmen.

Only three plans were offered as alternatives to the six presented by the chairmen. Representative Justus' plan, see Attachment C-27R-1 and C-27R-2, presented first at the June 13, 1991 public hearing created only one black district, and it did not have a higher black percentage of

registered voters than did the adopted plan (51.12% and 51.34% VR). It was never presented in the Senate for a vote. It was not proposed in the House to improve minority representation, and it would not have been an improvement over the adopted plan.

Representative Balmer's first plan, Balmer 6.2 (and the block level refinement of it), Attachments C-27R-3 & C-27R-4, was presented first in the House Congressional Redistricting Committee on June 3, 1991 and was not presented at any time to the Senate. No black constituents or General Assembly members expressed support of it. Although it purported to have two minority districts, the second one started [in] urban Charlotte and meandered over 200 miles, mostly through rural farming areas, to Wilmington. This district was only 45.32% black in voting age population. Its label as a "minority district" depended on the cohesion of black and Native American voters, and no such pattern was evident. See part C-28D below. Further, this plan dramatically decreased black influence in the 4th, 7th, 8th and 9th districts. Finally, the second "minority" district was so sprawling that it was most often described as "ludicrous" or "absurd". No black or Native American legislator supported it.

Representative Balmer's second plan (Balmer 7.8), Attachments C-27R-5 and C-27R-6, was never even seen by the Senate chairmen before they voted on the Conference Committee Report on S.B. 16. Rep. Balmer did not attempt to introduce it in the House until July 8, 1991, the day that the House voted to adopt the Conference Committee Report on S.B. 16. It was never presented to any Committee nor discussed with the House Chairmen, and it is doubtful that any plan, no matter what its content, would have been seriously considered under those circumstances.

Although one of Balmer's black districts in this plan (#3) was reasonably compact, the second (#2) sprawled all over eastern North Carolina and looked like a river

with many tributaries running from Virginia in the north to Wilmington in the south. It would be exceedingly hard to campaign effectively in this area, or to represent it well, since in many areas it is only one precinct wide.

In addition, this plan creates only four districts in which more than 15% of registered voters are black, as opposed to eight in Chapter 601, and only two of those have above 20% of registered voters black as opposed to six. Thus this plan seriously deminishes [sic] black influence in the remaining districts, for example districts 4, 5 and 8 in Chapter 601.

No minority member of the House voted in favor of suspending the rules to allow first reading of HB1310 on July 8, 1991 and none expressed support for this plan.

It is apparent that it is only possible to create one majority black district that is reasonably compact, and that is what Chapter 601 does.

C.4. It has been alleged that the single proposed majority black Congressional district does not provide the minority community with a realistic opportunity to elect a candidate of its choice. We would appreciate any response you can provide to this allegation.

Response complied [sic] by L. Winner:

The primary analysis of the statistics concerning this district is contained in the portion of the response compiled by Gerry Cohen.

I have discussed with the Senate and House Chairmen the basis of their conclusions that the district as enacted had an effective black voting majority.

Sen. Winner reports that he relied on logic and the results of the Gantt election. The numbers are such that black voters will definitely control the Democratic primary, and enough percentage of white voters will vote for a black Democrat over a white Republican that

if blacks vote as a bloc, the black candidate will win the general. No one has ever suggested to him that this district does not have an effective black voting majority.

Sen. Walker reports that because a majority of the registered voters are black, he believe [sic] a black candidate could be elected. No one ever suggested to him that the district as enacted does not have an effective black voting majority.

Sen. Johnson primarily relied on the raw numbers and the results of the Gantt/Helms election, which he thought was an excellent predictor for that area. If anything it should understate the black voting strength since Helms was extremely popular and well entrenched with whites in the area (he lives in Raleigh which is close by) and Gantt was from urban Charlotte which is distant and dissimilar from the small town and rural areas contained in this district.

Sen. Johnson also discussed the district with Rep. Hardaway (black; Halifax) who thought that the district had a high enough black percentage to allow blacks to control the outcome. He was thinking of running and was convinced he could win in the district as drawn.

Rep. Fitch discussed the district with several black members of the legislature and with several black members of the public. None of them suggested to him that a black candidate could not win in the district. He also relied on the numbers and the results of the Gantt election in that district. He believes that the fact that the district has been labeled a black district and will be perceived as a black district will in some ways become a self fulling prophesy [sic]. In addition he believes that blacks, who are a majority of the voters, will polarize to support a black candidate. The only question is turnout and blacks in that area have demonstrated on numerous occasions that they do turn out and vote in high publicity elections when there is a viable black candidate. Rep.

Fitch observed high black turnout for Mickey Michaux (1982), Ken Spaulding (1984), Howard Lee (1972), and Eva Clayton (1968) all running for congress in that general area (from a majority white district). There was also high turnout for Jesse Jackson in the Presidential Primary in 1988 and for Harvey Gantt in both the second primary and the general election in 1990.

He therefore concluded that if 57% of the registered Democrats are black, a black candidate can win the Democratic primary, and enough black voters will vote for the black candidate in the general election that, combined with even a low number of white votes, a black can win the general election.

Rep. Bowen had no one suggest to him that this Congressional district did not have a high enough black percentage to allow black voters to control the outcome of the election. He primarily relied on the staff's assessment that the district had a sufficient black population to be an effective black majority district.

Rep. Hunt believed that the district had an effective black voting majority because of the results of the Gantt/Helms race. Also, the black Representatives from throughout the area all seemed to believe that a black candidate could win in the district as drawn, so he deferred to them.

I know of no case that holds that a higher percentage of black voters is required to create a black district, particularly when no minority "community" has been fractured. There is no evidence of any discriminatory purpose in the configuration of this district. Indeed, Gerry Cohen and I continued to try to increase the black percentage in the district which we did in several of the successive base plans. The district is plainly not retrogressive. Since it has not discriminatory purpose, is not retrogressive, and is certainly not a "clear" violation of §2, it should not be the subject of an objection.

Exhibit 27

[Letterhead of U.S. Department of Justice, Civil Rights Division, Office of the Attorney General, Washington, D.C. 20035]

DEC 18 1991

Tiare B. Smiley, Esq.
Special Deputy Attorney General
P.O. Box 629
Raleigh, North Carolina 27602-0629

Dear Ms. Smiley:

This refers to chapter 675 (1991), which provides for the 1991 redistricting and a change in the method of election from 42 single-member districts and 30 multimember districts to 75 single-member districts and 20 multimember districts for the House of Representatives; Chapter 676 (1991), which provides for the 1991 redistricting plan and a change in the method of election from a 22 single-member districts and 28 multimember districts to 34 single-member districts and 8 multimember districts for the Senate; and Chapter 601 and Chapter 761 (1991), which provide for the increase from eleven to twelve congressional districts for the State of North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your response to our request for more information on November 5, 1991; supplemental information was received on November 18, 20, 21, 25, 26 and 27, and December 4, 10, 12 and 13, 1991.

We have carefully considered the information you have provided, as well as census data and information and comments from other interested persons. At the outset, we note that 40 of North Carolina's 100 counties are covered under the special provisions of Section 5 of the Voting Rights Act. As it applies to the redistricting process, the Voting Rights Act requires the Attorney

General to determine whether the submitting authority has sustained its burden of showing that each of the legislative choices made under a proposed plan is free of racially discriminatory purpose or retrogressive effect and that the submitted plan will not result in a clear violation of Section 2 of the Act. In the case of statewide redistrictings such as the instant ones, this examination requires us not only to review the overall impact of the plan on minority voters, but also to understand the reasons for and the impact of each of the legislative choices that were made in arriving at a particular plan.

In making these judgments, we apply the legal rules and precedents established by the federal courts and our published administrative guidelines. See, e.g., 28 C.F.R. 51.52 (a), 51.55, 51.56. For example, we cannot preclear those portions of a plan where the legislature has deferred to the interests of incumbents while refusing to accommodate the community of interest shared by insular minorities, see, e.g., *Garza v. Los Angeles County*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991); *Ketchum v. Byrne*, 740 F.2d 1398, 1408-09 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985), or where the proposed plan, given the demographics and racial concentrations in the jurisdiction, does not fairly reflect minority voting strength. *Thornburg v. Gingles*, 478 U. S. 30 (1986); *Hastert v. State Board of Elections*, ____ F. Supp. ___ (N. D. Ill., Nov. 6, 1991), 1991 WL 228185: *Wilkes County, Georgia v. United States*, 450 F. Supp. 1171, 1176 (D.D.C. 1978), *aff'd. mem.*, 439 U.S. 999 (1978).

Such concerns are frequently related to the unnecessary fragmentation of minority communities or the needless packing of minority constituents into a minimal number of districts in which they can expect to elect candidates of their choice. See 28 C.F.R. 51.59. We endeavor to evaluate these issues in the context of the demographic changes which compelled the particular

jurisdiction's need to redistrict and the options available to the legislature. Finally, our entire review is guided by the principle that the Act ensures fair election opportunities and does not require that any jurisdiction guarantee minority voters racial or ethnic proportional results.

With this background in mind, our analysis shows that, in large part, the North Carolina House, Senate and Congressional redistricting plans meet the Section 5 preclearance requirements. Each plan, however, has particular problems which raise various concerns for us under the Voting Rights Act. We describe each of these problem areas separately below.

Respecting the House plan, the proposed configuration of district boundary lines in the following three areas of the state appear to minimize black voting strength: the Southeast area, involving Sampson, Pender, Bladen, Duplin, New Hanover, Wayne, Lenoir and Jones Counties; the Northeast area in which the state proposes to create District 8; and Guilford County.

In general, it appears that in each of these areas the state does not propose to give effect to overall black voting strength, even though it seems that boundary lines logically could be drawn to recognize black population concentrations in each area in a manner that would more effectively provide to black voters an equal opportunity to participate in the political process and to elect candidates of their choice. Another factor which appears to adversely impact on minority voting strength, by limiting the number of majority minority districts, was the state's decision to manipulate black concentrations in a way calculated to protect white incumbents.

In the Southeast area of the state, the state was aware of the significant interest on the part of the black community in creating districts in which they would constitute a majority. In fact, alternatives providing for two additional black majority districts were presented to

the legislature. Rather than using this approach to recognize black voting strength, however, the proposed plan submerges concentrations of black voters in several multimember, white majority districts. Our own analysis suggests that a number of different boundary line configurations may be possible which more fairly recognize black population concentrations and provide minority voters an opportunity to elect candidates of their choice in at least one additional district.

In the Northeastern portion of the state, District 8 seems to have been drawn in such a way as to limit unnecessarily the potential for black voters to elect representatives of their choice. In spite of the 58 percent black population majority, serious concerns have been raised as to whether black voters in this district will have an equal opportunity to elect their preferred candidate, particularly given the fact that only 52 percent of the registered voters in the district are black. Our analysis indicates that a number of different options are available to draw District 8 in a manner which provides blacks an equal opportunity to participate in the electoral process (e.g., including in District 8 black concentrations in adjoining districts).

Similarly, in Guilford County the proposed plan fails to recognize black population concentrations, although reasonable configurations of boundary lines would permit an additional district that would provide black voters the opportunity to elect their candidates of choice. While we have noted the state's assertion that the division of the black community in Guilford County into several districts enhances black voting strength by providing black voters an opportunity to influence elections in additional districts, it appears that the plan in fact was designed to ensure the re-election of white incumbents. This conclusion is bolstered by what appears to be similarly motivated decisions of the legislature involving other areas of the state, such as in Mecklen-

burg County. There, the state drew two minority House districts, while the minority population appears to be sufficiently concentrated to allow for the drawing of three districts in which black voters would have an opportunity to elect candidates of their choice. While we are aware that Mecklenburg is not a county subject to the preclearance requirements of Section 5, information regarding the choices of boundary line changes in the county is relevant to our review of the concern that purposeful choices were made throughout the redistricting processes that adversely impact minority voting strength.

Respecting the Senate redistricting plan, the state has proposed district boundary lines in the southeast region of the state that appear to minimize black voting strength, given the particular demography of this area. Although boundary lines logically could be drawn to recognize black population concentrations in a manner that would more effectively provide to black voters an equal opportunity to participate in the political process and to elect a candidate of their choice, the proposed districts seem to be a result of the state's decision to use concentrations of black voters in white majority districts to protect white incumbents. Black citizens from this area testified that they felt a black majority single-member district could be fairly drawn, and alternatives providing for a black majority district were presented to the legislature. It appears, however, that concentrations of black voters have been submerged in several white majority districts. Our own analysis suggests that a number of different boundary line configurations may be possible which more fairly recognize black population concentrations and provide minority voters an opportunity to elect candidates of their choice in at least one additional district.

Respecting the congressional redistricting plan, we note that North Carolina has gained one additional con-

gressional seat because of an increase in the state's population. The proposed congressional plan contains one majority black congressional district drawn in the northeast region of the state. The unusually convoluted shape of that district does not appear to have been necessary to create a majority black district and, indeed, at least one alternative configuration was available that would have been more compact. Nonetheless, we have concluded that the irregular configuration of that district did not have the purpose or effect of minimizing minority voting strength in that region.

As in the House and Senate plans, however, the proposed configuration of the district boundary lines in the south-central to southeastern part of the state appear to minimize minority voting strength given the significant minority population in this area of the state. In general, it appears that the state chose not to give effect to black and Native American voting strength in this area, even though it seems that boundary lines that were no more irregular than found elsewhere in the proposed plan could have been drawn to recognize such minority concentration in this part of the state. *Jeffers v. Clinton*, 730 F.Supp. 196, 207 (E.D. Ark. 1989), *affirmed*, 111 S. Ct. 662 (1991).

We also note that the state was well aware of the significant interest on the part of the minority community in creating a second majority-minority congressional district in North Carolina. For the south-central to southeast area, there were several plans drawn providing for a second majority-minority congressional district, including at least one alternative presented to the legislature. No alternative plan providing for a second majority-minority congressional district was presented by the state to the public for comment. Nonetheless, significant support for such an alternative has been expressed by the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union

(ACLU). These alternatives, and other variations identified in our analysis, appear to provide the minority community with an opportunity to elect a second member of congress of their choice to office, but, despite this fact, such configuration for a second majority-minority congressional district was dismissed for what appears to be pretextual reasons. Indeed, some commenters have alleged that the state's decision to place the concentrations of minority voters in the southern part of the state into white majority districts attempts to ensure the election of white incumbents while minimizing minority electoral strength. Such submergence will have the expected result of "minimiz[ing] or cancel[ling] out the voting strength of [black and Native American minority voters]." *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). Although invited to do so, the state has yet to provide convincing evidence to the contrary.

In light of the considerations discussed above, cannot conclude, as I must under the Voting Rights Act, that the state's burden has been sustained in this instance with respect to the three proposed plans under review. Therefore on behalf of the Attorney General, I must object to the 1991 redistricting for the North Carolina State House, Senate, and Congressional plans to the extent that each incorporates the proposed configurations for the areas discussed above.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed 1991 House, Senate and Congressional redistricting plans have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. In addition you may request that the Attorney General reconsider the objections. However, until the objections are withdrawn or a judgment from the District of Columbia Court is obtained, the 1991 redistrictings for the North Carolina House,

Senate and Congressional Plans continue to be legally unenforceable. *Clark v. Roemer*, 59 U.S.L.W. 4583 (U.S. June 3, 1991); 28 C.F.R. 51.10 and 51.45.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of North Carolina plans to take concerning these matters. If you have any questions, you should call Richard Jerome (202-514-8696), an attorney in the Voting Section.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

Exhibit 33

[January 10, 1992 Article from *The Raleigh News and Observer*, "2 Black Districts Urged," "Proposal Favors N.C. Democrats"]

By Van Denton, Staff writer

Democratic congressmen and key state legislatures are showing a lot of interest in a proposal that would create two black congressional districts in North Carolina, including one that would stretch from Durham along the Interstate 85 corridor all the way to Charlotte.

In a private meeting Wednesday night with two top-ranking Democratic legislators, the congressmen came out in support of creating two minority districts as an alternative to defending the current plan in court.

Meanwhile, most of the 19 black legislators in the General Assembly have joined the North Carolina NAACP and other black groups in pushing for the creation of two black districts.

Both developments are shifts from the original positions of the congressmen and black legislators. When the congressional plan was rejected by the U.S. Justice Department last month, most members of both groups argued that the state should stand by its plan.

But now alternative proposals have been developed indicating that a second black district can be drawn without giving too many congressional seats to Republicans. And that prospect has more and more people thinking that's the way to go.

Legislative leaders still haven't discarded a previous congressional plan creating only one black district. But lawmakers appear ready to junk it next week when they reconvene for a special session on redistricting.

State Sen. Henson P. Barnes, the Senate's Democratic leader, said it appeared unlikely that the legislature would appeal the Justice Department's rejection to the

courts. A final decision may be made Monday when the full General Assembly reconvenes.

"The information we are getting is we cannot be successful in court on our present plan," Barnes said in an interview Thursday. "That being the case, my inclination is not to go to court."

The Justice Department rejected the original congressional plan because it failed to draw two congressional districts where racial minorities would be in the majority. It said the plan violated the Voting Rights Act by diluting the voting strength of minorities.

Since then, new ways of creating two black districts have been developed. The one getting the most attention is one designed initially by John Merritt, an aide to U.S. Rep. Charles G. Rose III, and since endorsed in concept by the National Association for the Advancement of Colored People.

Some observers have called the new proposal the"I-85 District." The district would begin in the black community in Durham, stretch up into Vance and Warren counties, then follow the Interstate 85 corridor southwest through Greensboro all the way to Charlotte.

Others have said a more appropriate nickname would be the "Aleutian Islands District" since it connects pockets of black communities in Durham, northeastern North Carolina, Greensboro, and Durham—communities that otherwise would be isolated in a sea of white voters—in a pattern resembling the Aleutian Islands off the coast of Alaska.

The proposal also creates a black congressional district in Eastern North Carolina—like the rejected plan does—but it would no longer include the black sections of Durham. Instead, it would extend into black communities in the southeastern part of the state.

Merritt said blacks would make up 56 percent of the

population in both districts and 52 percent of registered voters.

But a key attraction of the proposal is that instead of hurting Democratic congressmen, who now hold seven of the state's 11 congressional seats, it could result in Democrats gaining seats.

In fact, some think that after adding the new 12th congressional district, Democrats would win eight to nine of the 12 seats.

All of the state's Democratic congressmen, except for U.S. Rep. Walter B. Jones Sr. of Farmville, attended the unpublicized Wednesday night meeting with legislative leaders.

"They were trying to talk us out of going to court [to fight for the original plan]," Barnes said. "They had been crunching some figures themselves and had come to the conclusion that a second minority district could be created. When they came to that conclusion, they realized it hurt their chances in court."

Besides Barnes, other legislators attending the meeting were House Speaker Daniel T. Blue Jr. and most of the House and Senate redistricting chairmen.

The switch among black legislators came after a series of meetings Wednesday with members of other black groups, including the NAACP, the N.C. Black Leadership Caucus and the American Civil Liberties Union.

State Sen. James F. Richardson of Charlotte, chairman of the Legislative Black Caucus, said he did not think that white Democratic legislators would oppose creating two black congressional districts.

"I don't think they will feel threatened," Richardson said. "The Democrats have stood with us pretty well in the General Assembly."

State Rep. Robert Grady, a Republican from Jacksonville, said a second black district appears likely now that black legislators are calling for it.

"I don't think Democrats would fight the Justice Department and black legislators," Grady said. "To stand against the black caucus would be an extremely difficult position for them to be in."

Exhibit 38

[Excerpts from submission by State of North Carolina to the United States Department of Justice during the preclearance process for Chapter 7]

1992 CONGRESSIONAL BASE PLAN #10 is based in large part on the plan presented by Mary Peeler of the NAACP at the public hearing held in January 8, 1992. Modifications were made to that proposal to make each of the two black districts more homogeneous and to increase their black populations. Specifically, rural Vance, Caswell, Person and Granville Counties were removed from District 12, and the urban portions of Forsyth and Gaston Counties were substituted. This had the effect of leaving the 12th District somewhat more compact and more urban in character. As the 12th District is currently configured, 80% of its population lives in cities of 20,000 or more. These changes had the effect of increasing the black population of the district as proposed by the Peeler proposal from 56.13% black and 56.63% black. Given that 54.71% of the district's registered voters are black and an estimated 67.1% of the registered Democrats are black, this district, as modified from the one Ms. Peeler initially proposed, plainly has as effective black voting majority.

The major modification to the 1st District as Ms. Peeler proposed it was to add majority black portions of Vance County to it. By removing portions of the district with higher white percentages, the chairmen were able to boost the black population in that district from 56.05% black to 57.26% black. This district is now a predominantly rural district with 82% of its population living outside cities with 20,000 or more. As noted in part 27N above, the black population of the 1st District has been increased from 55.69% in the plan previously approved in the December 18, 1991 letter from the Attorney General, to 57.26% black in the enacted plan. Black

voter registration has been increased from 51.34% to 52.41%

No minority citizen suggested to either Congressional redistricting committee or to their chairmen that either of those districts lacked an effective black voting majority.

A handful of alternative plans were presented either in the House or Senate Committees, as floor amendments, or at the public hearing that had two majority black districts or two majority Native American plus black districts.

In some plans the second minority district relied on cohesiveness between black and Native American voters. See, for example the Justus proposal, Attachment 2C/27R-3, made to the House Committee and the plan Vann Ellison presented at the public hearing, included in Attachment 2C/28F-2 public hearing transcript. It is at best unclear whether those districts meet the *Thornburg v. Gingles* threshold test of being majority minority in voting age population, since the voting records produced with the State's submission of Chapter 601 do not demonstrate that the two groups regularly vote for the same candidates. It is noteworthy that Mary Peeler of the NAACP specifically requested at the public hearing that the legislature not rely on black and Native American cohesiveness in creating a second minority district. See attachment 2C/28F-2 at page 39. The enacted plan removes any doubt by creating two districts which are majority black in voting age population and voter registration without any reliance on Native American voters.

A few alternate plans were presented which had two majority black districts, namely the Kimbrough plan (presented at the public hearing, transcript in Attachment 2C/28F-2, the Flaherty plan, Attachment 2C/27R-4, the Peeler plan, Attachment 2C/27R-2 and two of the Balmer plans, Attachments 2C/27R-1(c) and (d)[.] None of

these had significantly higher black voter registration or voting age populations in the minority districts than does the enacted plan, except possibly Balmer Plan 8.1. See attachment 2C/27 R-1(c). It has an eastern black district that is 58.47% black total population. Representative Balmer accomplished this by including in his majority black district black voters from Wake County. This approach has two disadvantages. First, it combines a very urban population with a predominantly rural remainder of the district. Second, it removes Wake County voters from the 4th District, an area in which racially polarized voting is low, and in which black voters already enjoy a substantial opportunity to elect public officials of their choice. See further discussion of the 4th district in 2C/27N of this submittal. It is noteworthy that representative Balmer did not seek to have this plan presented to either the House or Senate Redistricting Committee in either the Regular or Extra Session, nor did he offer it as a floor amendment. It had no known black support. None of these plans give black voters a materially better opportunity to elect congressmen of their choice than does the enacted plan.

Representative Green offered a floor amendment which would have moved four precincts in Pitt County, including the one in which Congressman Walter Jones resides, from District 1 to District 2 and would have moved like number of people in Edgecombe County from the District 2 to District 1. See Attachment 2C/27R-5. This Amendment was opposed by Representative Fitch and was defeated in the House by a voice vote. The effect of the Amendment would have been to lower the black population in District 1 by .25% and would have placed Pitt County into three different congressional districts. There was significant sentiment in the House and in the Senate that it was better to have Pitt County in only two districts, especially since further division of it did not increase black percentages. In addition, Congressman Jones, who resides in the minority district

which Mr. Dunne approved in his December 18, 1991 letter, has said that he does not intend to run for reelection.

It was pointed out that since there is no residency requirement for congressional candidates, if he changes his mind, he can run again without regard to which district his home precinct is in.

Representative Flaherty's plan, Attachment 2C/27R-4, purports to create two black districts and what he terms an additional "minority influence district." Under current case law, the Voting Rights Act does not require legislative bodies to connect together minority populations into "influence districts." See *Gingles v. Edmisten*, 590 F. Supp. 345, 381 (E.D.N.C. 1984) (three judge court); *Hastert v. State Board of Elections*, 777 F. Supp. 634, 651-4 (N.D.Ill. 1991); *Turner v. Arkansas*, R-C-91-295 at pp. 32-40 (E.D.Ark. 1991).

In the case of the State's revised submittal, Chapter 7, it was the judgment of the legislature, including the black Speaker of the House and the black Chairman of the House Congressional Redistricting Committee, that black influence was greatest with, in addition to two majority black seats, the black population being greater than 20% in four districts (numbers 2, 3, 4, and 8). This was viewed by blacks as better than having 41.33% of one district and 20% of only one other district as in the Flaherty Congressional Plan, Attachment 2C/27R-4.

It is patently clear that Chapter 7 has an enhancing and not a retrogressive effect. It is also clear that its overriding purpose was to comply with the dictates of the Attorney General's December 18, 1991 letter and to create two congressional districts with effective black voting majorities.

Exhibit 41

[Editorial by Dan Blue, Speaker, North Carolina House of Representatives, submitted to various North Carolina newspapers following ratification of Chapter 7]

Justice Department has the last word

General Assembly defends its plan

By DANIEL T. BLUE

At first glance, the congressional redistricting plan approved by the General Assembly seems unreasonable and unnecessarily contorted. In short, it is an ugly map.

We agree. It is an ugly map. But it is the only map we could draw and still satisfy the U.S. Justice Department's interpretation of the Voting Rights Act.

There have been literally dozens of plans offered and all were considered by the redistricting chairmen, and every member had a chance to offer his or her plan in the committee debate and on the house floor. Many of the plans look better to the eye. [photo of Mr. Blue appears beside this paragraph]

Much attention has been focused on one submitted by the League of Women Voters. That map also seems to make perfect sense, and we agree it looks far better than ours. But we believe it would never be approved by the Justice Department. The two black districts it creates have less than 50 percent black population. This clearly does not allow the black citizens in those areas to elect a representative of their choice. In fact, the Justice Department balked at a minority district in the State House plan that has 58 percent black population.

The League of Women Voters' plan also counts native American voters in the southeast to constitute a minority district. Voting patterns show that native Americans do not vote with black citizens in that area and therefore

should not be counted in creating a "majority-minority district."

North Carolina's minority population is not sufficiently concentrated in any one area to draw a compact minority congressional district, which must contain 550,000 people. The plan passed by the General Assembly in June created one majority-minority district in the eastern part of the state, coursing through 25 counties. We decided at that time that it would be impossible to draw another majority-minority district without stringing together small pieces of black voters all over the state.

We still think that. The Justice Department rejected that plan, however, and pointed out that we could have drawn another minority district running from inner-city Charlotte through hundreds of rural towns and ending at Carolina Beach. We still believe that the Voting Rights Act was designed to prevent the fracturing or packing of the black vote, but not to require stringing black voters together to create a district and in the meantime helping Republicans get elected. We lost on that sensible interpretation.

Many arguments against our plan are good political arguments as to why Congress either needs to amend the Voting Rights Act or why we need to elect a president who will appoint a different head of the Civil Rights Division of the Justice Department.

When we reconvened this special session, we had one major goal when drawing another congressional redistricting plan—satisfy the Justice Department by drawing two majority minority districts and try to retain in them some community of interest.

The map we have drawn does that. One minority district is still in Eastern North Carolina and the second is an urban district, which runs along the Interstate 85 corridor of our state. That district was first suggested by Representative David Balmer of Charlotte, a Republican.

It is not a pretty district but we believe that black voters in the urban areas of Charlotte, Greensboro, Winston-Salem and Durham have much more in common than voters in West Charlotte, Whiteville and Carolina Beach.

We also believe the plan maintains a partisan balance in the state's congressional delegation. It creates four districts, including the two black districts, that are likely to elect Democrats. It creates three districts that are likely to elect Republicans. It creates five districts that could go either way.

We believe we drew a good, fair, congressional redistricting plan last June. The Justice Department decided to play partisan politics with the people of North Carolina and rejected that plan. The bureaucrats in Washington continue to think they know best about what we need in this state.

We have done the best we can to draw new congressional districts. We also understand the criticism of the plan. We now hope you understand how we did it.

Exhibit 47

[Excerpts from *Regional Landscapes of the United States and Canada*, Stephen S. Birdsall and John W. Florin (Wiley & Sons 2d Ed.), Borden Devon Dent, Cartographer, Georgia State University]

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[239] URBAN COALESCENCE AND ECONOMIC GROWTH

One of the striking characteristics of the South Atlantic States, indeed of the entire Southeast, is the region's abundance of small- and medium-size cities and its shortage of very large cities. Aside from the southern margins of Megalopolis, the Atlantic southern lowlands' largest city is Atlanta (1,803,600 in 1976 estimate). [footnote omitted] Other cities in the South roughly the size of Atlanta are relatively few and scattered about the periphery of the larger region: Miami (1.44 million) and Tampa-St. Petersburg (1.38 million) in Florida, Dallas (1.42 million) and Houston (2.4 million) in Texas, and New Orleans (1.1 million) in Louisiana. Within the Atlantic southern lowlands, however, there are a large number of small- and medium-size cities, each supported by local manufacturing and service activities that typify the region. Richmond (Virginia), Durham and Winston-Salem (North Carolina) contain production and warehouse facilities for the largest tobacco firms in the country. Greensboro and Burlington (North Carolina), Danville (Virginia), Greenville and Spartanburg (South Carolina), and Columbus (Georgia) are among the most populous of a large number of small cities in the region known for their textile industries, as is Roanoke (Virginia) immediately west of the Blue Ridge. In a similar manner, Lynchburg and Martinsville (Virginia), Thomasville, Lexington, and High Point (North Carolina), Georgetown and Charleston (South Carolina), and Savannah (Georgia) are only a few of the region's urban centers containing paper or furniture industries. None of these cities, however, nor any of the port cities along

the Atlantic coast generated the growth rates of Atlanta (within the region), Miami, Tampa-St. Petersburg, and the Texas cities. The growth stimulus has been too narrow, too recent, and, until recently, not from the most dynamic industries.

These numerous smaller urban centers form several significant clusters in the region, the most distinctive of which is called the "Piedmont Urban Crescent." It is composed of the cities located in a broad arc between Greenville, (South Carolina) and Raleigh (North Carolina) and contains such urban nodes as Spartanburg (South Carolina) and Charlotte, Winston-Salem, High Point, Greensboro, Burlington, and Durham (North Carolina [Figure 9-4]).

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[241] Such a grouping of smaller cities can often function as a large, sprawled urbanized area if transportation connections are constructed to support the degree of interaction required. The map showing highway traffic flows in the Atlantic southern lowlands is an indicator that such support does exist (Figure 9-5) [omitted].

Additional growth has been derived from the Piedmont Crescent's relative location within the region. The Crescent is located about half the distance between Washington, D.C., at the southern end of Megalopolis, and Atlanta, Georgia, an extremely dynamic regional growth center. Since the influence of both large cities declines with distance, the smaller cities of the Crescent do not need to compete with the full force of either city's tremendous pull on consumers, labor, and manufacturing and service industries. Within the Crescent, the largest single city is Charlotte (estimated SMSA population of 594,700 in 1976); it is rapidly becoming a commercial and financial center for the region. Less than 145 kilometers (90 miles) to the northeast, the Greensboro-Winston-Salem-High Point SMSA cluster of cities (estimated population of 769,200 in 1976) com-

prises the largest industrial market in the Atlantic southern lowlands after Atlanta. Significantly, Charlotte is about 415 highway kilometers (260 miles) from Atlanta and Greensboro is about 530 highway kilometers (330 miles) from Washington, so the Charlotte-Greensboro axis lies halfway between two dominant urban "poles" in the region. Growth has been great enough in the greater metropolitan area of Charlotte, spilling into adjacent South Carolina counties, that local geographers have been calling the entire metropolitan region "Metrolina" to indicate its dispersed urban character and two-state location.

In spite of the growth of these cities, and numerous others located in a more dispersed pattern across the coastal plain portion of the region, there is a sizable rural and small-town population that resides many miles from the primary growth centers. This population contains numerous families that continue in economic circumstances little changed from those of two or three generations earlier. Rural industrialization has affected the earning power of some.

FIGURE 9-4
THE PIEDMONT URBAN CRESCENT. The small and medium-size cities in this arc on the North and South Carolina Piedmont have begun to merge their urban territories though the same process of sprawl and coalescence that have occurred on a much larger scale in Megalopolis.

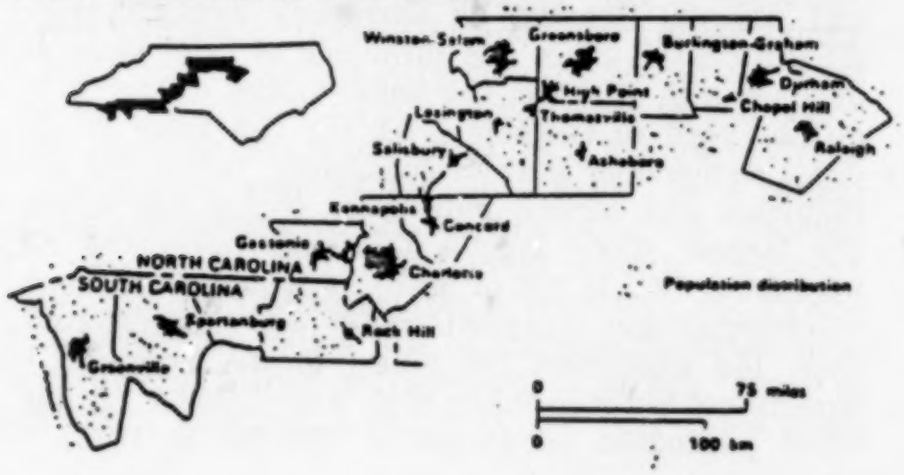


Exhibit 195

[Letterhead of U.S. Department of Justice, Civil Rights Division, Office of the Attorney General, Washington, D.C. 20035]

7 DEC 1981

Mr. Alex K. Brock
Executive Secretary-Director
State Board of Elections
Suite 801 Raleigh Building
5 West Hargett Street
Raleigh, North Carolina 27601

Dear Mr. Brock:

This is in reference to Chapter 894 (S.B. No. 87, 1981) and Chapter 821 (S.B. No. 313, 1981), providing for the reapportionment of United States Congressional districts and for the reapportionment of the North Carolina Senate. Your submission, pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, was initially received on July 16, 1981, and was supplemented with requested additional information on October 6, 1981.

Under Section 5, the State bears the burden of proving the absence of both discriminatory purpose and effect in proposed redistricting plans. *City of Rome v. United States*, 446 U.S. 156, 183 n.18 (1980); *Beer v. United States*, 425 U.S. 130, 140-41 (1976). In order to show the absence of a racially discriminatory effect, the State of North Carolina must demonstrate, at a minimum, that the proposed redistricting plans will not lead to "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States, supra*, 425 U.S. at 141. While the State is under no obligation to maximize minority voting strength, the State must demonstrate that the plan "fairly reflects the strength of [minority] voting power as it exists." *Mississippi v. United States*, 490 F. Supp. 569, 581 (D.D.C. 1979), citing *Beer v. United States*,

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supra, 425 U.S. at 139 n.11 and 141; and *City of Richmond v. United States*, 422 U.S. 358, 362 (1975).

We have given careful consideration to all of the forwarded materials, as well as past legislative reapportionment plans, comments from interested citizens, and other information available to us. With regard to the Senate plan, we note at the outset that the proposed redistricting plan was developed by the North Carolina Legislature pursuant to a 1968 amendment to the North Carolina Constitution which provides that no county shall be divided in the formation of a Senate or Representative district. As you know, on November 30, 1981, the Attorney General interposed an objection to that amendment under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, because "[o]ur analysis show[ed] that the prohibition against dividing the 40 covered counties in the formation of Senate and House districts predictably requires, and has led to the use of, large multi-member districts." Our review of the 1968 amendment also showed "that the use of such multi-member districts necessarily submerges cognizable minority population concentrations into large white electorates." Accordingly, we have reviewed the Senate plan not only to determine whether the proposed plan would lead to a "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," *Beer, supra* 425 U.S. at 141, but also to see whether it fairly reflects minority voting strength as it exists today. *State of Mississippi v. United States*, 490 F. Supp. 569 (D.D.C. 1979).

Our analysis of the Senate plan shows that in several counties covered by the Voting Rights Act's special provisions, such as in Guilford, Wilson, Nash, Bertie, Edgecomb and Martin, there are cognizable concentrations of minority persons whose political strength is diluted as a result of the use of multi-member districts in the proposed redistricting plan. In Guilford, for example,

the State has proposed the creation of a three-member district with a black population percentage of only 25 percent. Yet, under a fairly-drawn system of single-member districts in that area, one such district likely would be majority black and, therefore, would better recognize the potential of blacks to elect representation of their choice.

Likewise, in Wilson, Nash, Edgecomb, Martin and several of the counties in proposed District 1 which are covered jurisdictions, the State proposes to create multi-member districts in which black voters seem to have no opportunity to elect candidates of their choice. Here again, fairly-drawn single-member districts would likely result in Senate districts that would not, as the proposed Senate plan does, minimize the voting potential of black voters in those covered counties.

Understandably, these effects of the proposed Senate reapportionment plan well may have been the result of the State's adherence to the 1968 constitutional amendment which, as we have already found, necessarily requires a submerging of sizeable black communities into large multi-member districts. In view of the concerns discussed above, however, I am unable to conclude, as I must under the Voting Rights Act, that the proposed Senate redistricting plan is free of a racially discriminatory purpose or effect. Accordingly, on behalf of the Attorney General, I must interpose an objection to the Senate plan under Section 5 of the Voting Rights Act of 1965 as it relates to the covered counties.

With respect to the Congressional redistricting, we have also completed review of that submission. During the course of our review, we were presented with allegations that the decision to exclude Durham County from Congressional District No. 2 had the effect of minimizing minority voting strength and in addition was motivated by racial considerations, i.e., the desire to preclude from that district the voting influence of the

politically-active black community in Durham. On the basis of the information that has been made available to us, we main unable to conclude that the State's decision to draw District No. 2 was wholly free from discriminatory purpose and effect. In this connection we find particularly troublesome the "strangely irregular" shape of Congressional District No. 2 (see *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960)), which appears designed to exclude Durham County from that district contrary to the House Congressional Redistricting Committee's recommendation.

We note also that, over the past several redistrictings, the black population percentage in District 2 has been decreased. Prior to the State's 1971 redistricting District No. 2 was approximately 43 percent black. Under the 1971 reapportionment plan, District 2 decreased to 40.2 percent black population. The 1981 submitted plan would reduce further the black population in the district to 36.7 percent. This reduction in black population percentage, occurring despite a statewide increase in the black population, is especially crucial in District 2, because it occurs in the only district where black voters could have the potential for electing a candidate of their choice.

We recognize that the State may want to respond further to the claims that a racially discriminatory purpose and effect were involved in the Legislature's decision to circumvent Durham. However, because of the time constraints imposed on the Attorney General by Section 5, and the unanswered questions still remaining, I cannot conclude that the burden imposed on the State by Section 5 has been sustained. Accordingly, I must interpose an objection also to the Congressional redistricting insofar as it affects the covered counties. However, should the state desire to present to us information relating to the configuration of District 2 which would address the allegations mentioned above, we

stand ready to reconsider this determination as provided in the Section 5 guidelines.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the Congressional redistricting plan has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group. However, until the objection is withdrawn or the judgment from the District of Columbia Court is obtained, the effect of the objection by the Attorney General is to make the Congressional redistricting plan legally unenforceable in the covered counties.

If you have any questions concerning this matter, please feel free to call Carl W. Gabel (202/724-7439), Director of the Section 5 Unit of the Voting Section. As always, we stand ready to assist you in any way possible in your reapportionment effort.

Sincerely,

/s/ Wm. Bradford Reynolds
Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

Exhibit 199

[Letter from Republican Congressmen Coble and McMillan to John R. Dunne, Assistant Attorney General, United States Department of Justice]

June 13, 1991

The Honorable John R. Dunne
Assistant Attorney General
Civil Rights Division
U.S. Justice Department
Washington, D.C. 20530

Dear Mr. Dunne:

We are writing to request that the voting rights section of the Justice Department investigate the current redistricting process for congressional redistricting in North Carolina. Recently the House of Representatives in North Carolina Committee on Redistricting passed a plan for congressional redistricting which will be the subject of public hearings. The plan as proposed has several major flaws, among them gross partisan gerrymanders for the sole purpose of incumbency protection of the majority party candidates.

Specifically, with regard to voting rights enforcement, the counties of Bladen, Robeson, Scotland, Cumberland, Hoke, Harnett, Lee, Anson and Union are covered jurisdictions under Section 5 of the Voting Rights Act. Since the 1980 Census, it has been apparent that these counties contain concentrations of minority populations in significant numbers which are politically cohesive. In the 1980 Redistricting, this concentration was divided among three Congressional Districts, the 8th, 7th and 3rd. This configuration had the effect of fracturing this group of voters. The proposed North Carolina congressional plan that is being considered by the House continues this fracturing of these minority voters into three congressional districts. The effect of this plan, if enacted, violates federal law and the stated criteria for drafting redistricting proposals.

Secondly, the proposed district in the Northeast, which is also covered under Section 5 of the Voting Rights Act lacks the requisite concentration of voting population to insure that the minority population has a reasonable chance for electing a candidate of their choice.

We are writing to you at this stage in the redistricting process to request your assistance in preventing at an early stage the violation of federal law. We urge you to closely examine the fracturing of voters in the Southeast and the failure to create districts of sufficient minority concentration in the Northeast areas of our state. In addition we ask that you bring appropriate legal action as soon as possible to prevent the 1992 elections from proceeding under any plan which violates federal law.

We are by copy of this letter to the state redistricting committees making our comments known to them in hopes of alerting the members of the committee that the adoption of this plan as proposed does not conform to federal law and to go back to the drawing boards.

Sincerely,

/s/ Howard Coble
HOWARD COBLE
Member of Congress

/s/ Alex McMillan
J. ALEX MCMILLAN
Member of Congress

CASS BALLENGER
Member of Congress

CHARLES TAYLOR
Member of Congress

Exhibit 200

NOTICE OF PUBLIC HEARING

The State House Committees on Redistricting are holding a series of public hearings on legislative and congressional redistricting.

The hearings are separate and in addition to the public hearings that have been held by the State Senate Redistricting Committee.

The hearings will be held at the following times and places:

* Jacksonville	21 MARCH 7:00 p.m. Courtroom Old Onslow County Courthouse Jacksonville, N.C. Contact: Rep. Bruce Ethridge, Rep. Charles Albertson
* Rocky Mount	26 MARCH 7:00 p.m. Council Chambers City Hall Rocky Mount, N.C. Contacts: Rep. Thomas C. Hardaway, Rep. Howard Hunter
* Winston-Salem	26 MARCH 7:00 p.m. Board of Aldermen's Room City Hall Winston-Salem, N.C. Contact: Rep. Annie B. Kennedy, Rep. Warren Oldham
* Fayetteville	27 MARCH 7:00 p.m. Room 119 New Cumberland County Courthouse Dick Street Fayetteville, N.C. Contact: Rep. Nick Jeralds, Rep. Alex Warner

* Chapel Hill	4 APRIL 7:00 p.m. Courtroom Franklin Street Post Office Chapel Hill, N.C. Contacts: Rep. Joe Hackney, Rep. Anne Barnes
* Williamston	4 APRIL 7:00 p.m. Courtroom Martin County Governmental Center Williamston, N.C. Contact: Rep. R. Eugene Rogers, Rep. Walter B. Jones, Jr.
* Statesville	5 April 6:00 p.m. Old Iredell County Courthouse Statesville, N.C. Contact: Rep. C. Robert Brawley, Rep. Doris Huffman
* Gastonia	5 APRIL 7:00 p.m. Health Sciences Auditorium Gaston College Gastonia, N.C. Contact: Rep. John McLaughlin, Rep. Clayton Loflin
* Asheville	6 APRIL 9:00 a.m. 5th Floor Courtroom Buncombe County Courthouse Asheville, N.C. Contacts: Reps. N.J. Crawford, Martin Nesbitt

The purpose of each hearing will be to give the citizens of the State as well as interested groups an opportunity to express their views on legislative and congressional redistricting, and to give the members of the Committees the opportunity to learn from such public input.

The 1991 North Carolina General Assembly is required by law to redraw the districts from which the following are elected:

- all the members of the State House of Representatives,
- all the members of the State Senate, and
- North Carolina's members of the United States House of Representatives.

The redistricting must be based on the 1990 U.S. Census. If the General Assembly finds that the State House, State Senate, or U.S. House districts contain certain inequalities that are legally impermissible, then it must shift the population of the districts to adjust the inequalities.

Two State House committees have been created: the Committee on Congressional Redistricting and the Committee on Legislative and Local Redistricting; they will both make recommendations to the full House of Representatives. Both committees share the same three Co-Chairs, Representatives Edward C. Bowen, Milton F. Fitch Jr., and R. Samuel Hunt III.

The Committees invite any citizen or group to express any views that are relevant to the Committee's purpose. Of particular interest to the Committees are the public's ideas concerning:

- the criteria that the General Assembly should use in drawing legislative and congressional redistricting plans.
- the ethnic, geographic, economic, or other communities of interest that may exist within certain legislative or congressional districts that should bear on the General Assembly's consideration.
- the redrawing of particular legislative or congressional districts or of the entire State. Specific written proposals are welcome.

The Committees encourage anyone making a presentation at the hearing to submit a written statement to the Committees and to make a brief oral summary of that statement at the hearing.

Later in the process of redistricting, after redistricting plans have been proposed but not enacted, an additional public hearing will be held to receive public comment on those plans.

Anyone who has questions about the hearings should write or call one of the Co-Chairs of the House Committee on Redistricting:

—Representative Edward C. Bowen
1217 State Legislative Building
Raleigh NC 27603-5925
(919)733-5757

—Representative Milton F. Fitch Jr.
1202 State Legislative Building
Raleigh NC 27603-5925
(919)733-5808

—Representative R. Samuel Hunt III
1323 State Legislative Building
Raleigh NC 27603-5925
(919)733-5775

SENATE REDISTRICTING PUBLIC HEARING
Asheville, N.C.

March 15, 1991

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[4] VOLK: I'm, Barbara Volk of Reedy Creek. I appreciate the chance to present to the committee one of our concerns is that when the committee looks at redistricting they try to keep areas of similar interests and similar types of communities together rather than trying to put together areas that have great disparity of concerns as to population types. And, we—necessary to do this I personally support breaking [5] up counties if necessary. I know that counties are very strong in North Carolina but if necessary to get proper proportions I would support taking off certain precincts into making a district.

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PUBLIC HEARING
Wilson, N.C.

March 18, 1991

• • • •

[2] Reverend Thomas Walker,
Edgecombe County Commissioner.

Reverend Walker addressed the issue of Black representation in the General Assembly. Although 22 percent of the State's population is Black, only 12 percent of the House and 10 percent of the Senate are Black. He urges the committee "to remedy this inequity" creating "some single-member districts that will afford the opportunity for us to elect at least 25 Blacks to the State House and at least 10 Blacks to the State Senate." These districts would need to have at least 65 percent Black population.

In his comments regarding Congressional Redistricting, Rev. Walker stated, "To reach parity, the Black community would be entitled to two and one-half seats in the U.S. Congress . . . . I ask you to draw at least two majority Black Congressional districts—one rural and one urban."

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INFORMATION ON STATE LEGISLATIVE REDISTRICTING
THIRD DISTRICT BLACK LEADERSHIP CAUCUS

March 21, 1991

• • • •

Jerome Shipman: V. We recommend that the 12th congressional district be established in the northeast with a rural commonality. Further, we recommend that every possible consideration be given to establishing an urban *majority*-minority congressional district and a rural *majority*-minority congressional district (referenced above): two *majority*-minority congressional districts.

• • • •

ROCKY MOUNT PUBLIC HEARING
March 26, 1991

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[7] Rev. Locks: Good evening Mr. Chairman, and to the members of the state legislature. I see both the House and Senate here represented tonight, and we are glad to have the opportunity to say a few words of encouragement to you, in the midst of what must be a very trying experience. I, like others certainly want to express appreciation for your taking time out of your very busy schedule to get input from the public sector on the matter of redistricting. I am Reverend Sidney A. Locks, pastor of Cornerstone Missionary Baptist Church in Greenville and served for four terms recently in the House of Representatives. I too express a sincere hope to keep and to make a great state even greater. I am here representing Pitt County in many ways. One, as the Political Action Chairperson of the Greenville/Pitt County Black Ministerial Alliance. I serve on the Political Action Committee of the General Baptist State Convention, I am a member of the Executive Committee of the Pitt/Greenville Chamber of Commerce, and I have come tonight to share some concerns that many North Carolinians have relative to the congressional redistricting that must be done. Mr. Chairman we hope that you fair well in that experience.

Locks: Almost a full century now, no African-American has had the opportunity to share in the U.S. Congress as you by now well know. It is our belief that there are many extremely qualified African-Americans in the great state of North Carolina that are more than qualified to serve all of the people of this state. We encourage you as you do your work that you will provide ample opportunity for as many as possible to do so. We recognize there will be at least three persons in terms of the number of African-American North Carolinians, and certainly we want to request that you look for those, but

at least hopefully two districts be drawn wherein African-American North Carolinians have an opportunity to serve.

Locks: It is my considered opinion that we have been structured out of the congressional opportunity of serving North Carolina. By structured out I mean that by virtue [of] the very system itself, [8] does not lend toward opening up the opportunities for minorities. For example, until only recently, (and of the group of persons that began serving, I think Senator Ballance is indeed one of those in the Legislature) in '83, that we really began since the last redistricting to see an increasing number of minorities. Not nearly as many as would be fair or the number that should be, but indeed a great increase over what it was over a decade ago. And certainly Mr. Chairman, we do want to make it part of the record that this important body of the General Assembly made that possible. But even since then, by virtue of fact, that the Legislature made certain that minorities, African-Americans, had the opportunities to be elected by sitting down and taking pains to make sure that there were districts where that was possible.

Locks: We are not saying that we need a ninety-percent district or an eighty-percent district, or seventy-percent district. We just want the opportunity to be elected and we believe that that is possible. We encourage you to look very closely at the weight of the historical way that redistricting has been done, because we believe that it historically has also kept African-Americans out. By historically I mean for example the way that the incumbency, the importance of incumbency on redistricting. We recognize that you would not have much ?????? [sic] if you did not protect at least your own district and yourself. But if there are opportunities where incumbency does not have any weight, encourage particularly, and there is rumor that there may be in the east the possibility of there not being incumbency as it

relates to a congressional district. We certainly want you to take that area as a priority.

Rev. Locks: Also as it relates to the House and Senate, we again appeal that you would look for opportunities for more minorities to be elected. More women to be elected and we believe that there are some additional opportunities. We don't come and ask that you change the whole state to single member districts. We recognize that the population is so diverse in the state that what we would prefer you to do is to be creative and be intentional in what you do. But most of all be fair. And we believe that that would indeed be done. Most of all we have confidence in the system, and believe that when the dust settles and the smoke clears, that you the members of both Houses, and especially members of the House of Representatives, pardon me for saying, but that's where my heart truly is, will do the best job. We hope at some future time to share with you from the public sector some suggested plans and opportunities. We commend you in the work that you are doing and encourage that you would consider these situations.

Fitch: Thank you Rep. Locks. Vivian Tillman, Edgecombe County Democratic Chairman.

Vivian Tillman: Thank you Rep. Fitch, and to the other members of the state legislature. I am Vivian Tillman and I represent [9] Edgecombe County Democratic Party as the chair. As we think about redistricting there are numerous ways that this can be done. There is the fair representation wherein you involve black, white and other minorities, and there is the white domination way, and there is the Black domination. So as you study and plan to redistrict or redraw the lines for the House, I ask that you consider the following: Number 1, consider geographic areas, keep the counties and the precincts together. That is the state voting district. We would ask that you would not divide precincts and not divide counties if possible. The second thing, consider major

racial groups with the lines drawn to reflect population change, public interest groups, that will meet the legal guidelines and draw lines so that we will have representation from all groups.

Tillman: As you have determined the boundaries of the congressional district, we would like for you to consider combining largely populated, industrialized urban counties together. Consider combining rural and agricultural counties in a district, and avoid combining a large population with a total of 35% of the votes in the district, with 10 smaller populated counties with the remaining 65 as we have here in the second congressional district. We thank you for listening and hope you will consider these suggestions.

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CONGRESSIONAL REDISTRICTING PUBLIC HEARING

April 6, 1991

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[23] Keith Holtsclaw: The physical geography of the mountains literally separates us from the Piedmont . . . . in fact a lack of interest when compared to the Piedmont . . . . increased importance of tourism in the mountains that completely gives us a completely different set of priorities than the Piedmont.

Given these facts, its only common sense that our Congressman will be better able to represent a homogenous district. The mountains are so unique and do not need to be piecemeal in other districts where they would be . . . . and more importantly competing with priorities thats' [sic] more industrialized Piedmont. This size of this . . . . could well give the mountain counties . . . . compared to more industrialized counties.

In summary, I would like to say the similarities, problems, ... counties in Western North Carolina in the 11th Districts have a high degree of chronology. They're much better serving the Congress by the Congressman focusing on specifics than a wide range of diverse needs.

Breaking up the makeup of the mountain counties in the 11th District [would] be totally counter productive and reduce the effectiveness of representation in Congress if not . . . .

Thank you very much.

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CONGRESSIONAL REDISTRICTING PUBLIC HEARING

June 13, 1991

* * * *

[40] Betsy McCrodden: Four, respect for communities of interest. Districts should also reflect some community of interest. Common interest defined by social, ethnic, or racial and economic considerations should be considered in the same way that political jurisdictions are.

Fifth, compact, contiguous territories. Convenient, contiguous territories should be grouped together. Districts with irregular outcroppings and indentations, which are found in most of the proposals so far, appear to be designed to incorporate similar divisions not historically or geographically related.

Sixth, respect for geographic boundaries. Natural [41] geographic boundaries such as bodies of water or distinct geographic regions should be followed where possible. Bridges, ferries, and common interests, however, may override this consideration in favor of others that create community things like common media markets, transportation facilities linking a suburb and a central city, similar living standards.

Seventh, encouragement of dialogue. Districts should encourage, not stifle, competition between both parties and candidates. Competition promotes dialogue on public issues, encourages informed voting, and holds elected officials accountable for their actions. Protecting incumbents of either party should not have a high priority in the consideration of new district boundaries.

* * * *

PUBLIC HEARING ON CONGRESSIONAL PLAN

January 8, 1992

* * * *

[16] Robert Hunter: I think that it is important that you treat all urban areas alike, and that you place minority concentrations in all the urban areas in a similar district, so that urban blacks in Raleigh, Durham, Greensboro, Winston-Salem, and Charlotte are all treated in a similar fashion, and that you not try to treat interest groups in two different ways.

* * * *

[18] Scott Kimbrough: A quick analysis, however, reveals three arguments that I hope will allow you to support my plan.

First, two black majority districts, Districts 2 and 7, are created. Both consist of greater than 51 percent black registered voters.

Also, in vast contrast to the plan ratified by the General Assembly, these districts include the largest urban black communities in the state; namely Charlotte, Greensboro-High Point, Raleigh, Fayetteville, Durham, Winston-Salem, Greenville, and Goldsboro. The plan rejected by the U.S. Department of Justice included only Durham and Goldsboro.

Typically the urban communities are better politically organized and are therefore more valuable to the black districts.

Second, this plan establishes districts of regional identity, like the Triad, the Triangle, Metro Charlotte, and a district completely containing our two estuaries, the Albemarle and Pamlico Sounds.

[19] The plan accomplishes this while splitting only 22 counties statewide. You may recall that the ratified plans split 34 counties.

Third, this plan enhances the political power of the small, rural counties by removing the large metropolitan areas from their districts, and an overwhelming influence in the electoral process with them. This allows a better distribution of political power throughout the state.

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[32] Theaoseus Clayton, Jr.: I support the second minority district concept, but not at any price.

The great challenge is where, and how, the district lines will be drawn to create a second minority district. The population warrants a second district, but should we have two weak unelectable minority districts on paper resulting in no increase in minority elected participation?

Like other interested parties, incumbent congressmen, and potential candidates, I prefer a plan that provides for homogeneity, if compact, and leaves more [. . .]

• • • •

[34] The I-85 Virginia line minority district may have some merit, should — and should be considered but not as it is currently drawn, carving up the 1st Congressional District. This is not acceptable. Why butcher one minority district to create a second one, when in fact sufficient populations exist within the state without decimating the 1st Congressional District?

Where is the homogeneity — in Granville, Vance, Warren, or Northampton, with Charlotte, Winston-Salem, or Greensboro voters? Persons living in Warren, Vance and Granville shop, attend coastal affairs and sporting events in Durham, and use the commercial — There should be some rational basis for the district lines.

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SENATE SUBCOMMITTEE ON CONGRESSIONAL REDISTRICTING
January 22, 1992

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[16] DAUGHTRY: Second questions is. The question is the fact that a number of people blame the Justice Department for the fact [17] that we are here and for the fact that we have not followed the laws related to the Voting Rights Act. It is true isn't it that the Justice Department never drew any of these districts. We just sent proposals and we have——

WINNER: Well, that's what they said. but I don't believe that. Not only did I think that we did not violate the Voting Rights Act. But I think we went, my personal view is and has always been that we went farther than the Voting Rights Act required the first time. The Voting Rights Act which obviously has to do a lot with how — with removing impediments for people voting. But that's not what we're talking about here.

The Voting Rights Act with regards to how districts are formed, as best I can tell from taking [sic] to people who voted for it, and was never intended to say that you have to take little Black, or minority concentrations that are disparate and put them together when you can make a district. Like the Bush Administration is forcing us to do. What it says is — what it says is that you cannot submerge Black concentrates that are big enough to have a majority, by using mechanisms like multi-member districts when you have a majority of Blacks to overwhelm them or by fragmenting them. Now, there is no place in the State of North Carolina — zero place that there is enough concentration of Blacks that you can form a reasonable compact Black district without going and getting disparate Black areas, but — And that's why I think the only reasonable plan that I've ever seen during this whole exercise and it wasn't complete was one that I sketched out before it was on the computer, and before

we started talking about this in which we ended up with twelve reasonable compact districts, and there were no minority districts in it.

I become convinced early on in this that is was arguable, at least, that there was enough Black concentration in the northeast part of the state that you might have to do this. And, that's why I tried to lead us into passing what we passed. Not because I don't think it did, but because at least it was reasonable to argue that. But it is totally unreasonable and not within the intent of the Voting Rights Act, to stay [sic] that you have got to go pick up a piece of the Black community in Wilmington and combine it with a little piece in Columbus County and a little piece in Robeson County and the Lumbee Indians and a little piece in Union County and the Blacks in Charlotte to make a district. Or, that you have to combine a little piece in Gastonia with [a] little piece in Charlotte and like a string of pearls up I-85. I think it is an absolute intentional distortion of the law, and I think it was done for one purpose and one purpose only and that was to protect Republican Congressman. And it did that.

I mean, there is not doubt that Howard Coble's district which was shaky under the prior plan, is now safe; that Congressman McMillan's district which wasn't really shaky, [18] but is now safer. And, that Congressman Neal's district under this plan, which was not safe, but is much less safe, and that the eigth [sic] district is less safe. So I think it accomplished what the Justice Department wanted it too [sic], which was to protect Republican congressmen. Didn't protect them all, and so we're going to hear some more of this, I'm sure. But I—

* * * *

[21] WINNER: As a matter of fact, I [sic] will work. Senator Walker drew a plan that has about the same net effect on Congressmen, using that district as this one. It will work. But the problem, but it's worse than this for

two reasons — three reasons. First of all, it's worse than this because it is less compact, even thought [sic] the 85 district obviously is extremely narrow it's 170 miles long, not 250 miles long. It has a corridor that's easy to travel, not ah, not—

ODOM: Not during construction[.] (laughter)

WINNER: - - - it' [sic] only two and a half hours driving time from one end to the other, the other had four hours driving time from one end to the other. So, it is more compact.

Number two: there is clearly more of a community of interest. I mean you are combining urban people essentially — up and down, all the way from up in Gastonia to Durham, so it does have that advantage.

Number three: It is solely a Piedmont district and you have that community of interest rather than trying to combine the rural east with the Piedmont.

And, Number Four: it only — well I'd hate to run in any of those districts — it's only in three mass media areas, instead of five mass media areas, which the Charlotte to Wilmington district has to go through. So, those are the advantages.

DAUGHTRY: Dennis, if you can convince this body that that is a compact district, then you ought to get into real estate.

WINNER: No, Sir, it is not — it is not compact, Senator Daughtry. I never did. It's a terrible district. But it's more compact than a Charlotte to Wilmington district.

BALLANCE: Mr. Chairman, Senator Winner. These plans — this plan has two quote, unquote minority districts — 57 point plus percent Black, is that right?

WINNER: You mean population. That is correct.

BALLANCE: Have you seen any other plan that would do as well to create two Black districts.

WINNER: I have seen no other plan that would do — that would create any more bigger concentration of minorities than this.

[22] BALLANCE: Let me make this point, Mr. Chairman, then I'm quitting.

Now, a little earlier I believe the Senator said something about the Civil Rights Act, that was the wrong act. I think he was referring to the Voting Rights Act. None the less, now let's be honest about this. You cannot blame the Voting Rights Act which was designed, as Senator Winner said, to create an opportunity where there was none. So if you want to blame something, I'm not going to use the term *racism*, but let's use the term *insensitivity*. We all know that the reason this whole act came about was because Blacks were not able to get elected. So, let's don't blame the remedy, let's blame the problem. And, now we are trying to create an opportunity where Blacks can get elected. And, I can say this as a person who has been elected in a district created where Blacks can get elected. The white voters change their opinion once they have an opportunity to communicate and to see what Black citizens can do if they are given an opportunity. And, many Black[s] who are elected in minority districts as was pointed out in Senator Richardson's district, don't need as heavy a concentration the second and third time around because white voters support them.

And, I heard — I read where Harvey Gantt said just yesterday that he didn't want to run in a Black district, that he wants to build a coalition of Black and White voters. And, I think that's really the way we all want to go in the future. But I don't think we ought to go around and blame the remedy for the problem. And I just wanted to make that on the record.

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NORTH CAROLINA GENERAL ASSEMBLY
SENATE
1991 EXTRA SESSION

THE DAILY PROCEEDINGS IN THE SENATE CHAMBER

Lieutenant Governor James C. Gardner, Presiding

Thursday, January 23, 1992

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[3] Senator Kincaid: Senator, again, I have not been a member of the Committee and you have been to a lot of hearings and I haven't but—and I haven't read a lot from Justice that probably you have, but has Justice stated that they have to be—the minority have to be assured of winning in these districts?

Senator Winner: No, sorry, they don't say that they have to be assured of winning, they have to be assured of making the choice. In other words, that it's the minorities[']choice. They can vote for a white person if they want to. But they have to have control of the district. And it's not just Justice that says that. There's just an abundance of judicial case law that says that—all the way up to the Jingles [sic] Decision—it just doesn't comply—wish that it did because I think, I think what we're being forced to put on North Carolina is terrible. You're gonna hear me say it again when I talk about the plan. And, I just don't see any way around it. I mean you can have different terrible plans, but one way or the other if your [sic] gonna do this. And I don't think that was a terrible plan and, but there is just no way it's gonna get by.

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DAILY PROCEEDINGS IN THE SENATE CHAMBER

Friday, January 24, 1992

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[2] Lt. Governor: Senator Winner.

Senator Winner: Mr. President, ladies and gentlemen of the Senate. I'm going — I hope — I'm going to ask you to be patient with me, 'cause I've got some things I want to get out—off my chest about this bill.

The bill before you is the bill that the House passed last night creating twelve Congressional Districts in the State of North Carolina. Because it had not been assigned to the Redistricting Committee, we had a meeting this morning and agreed that if that bill — that we would take that bill up anyway and that if it passed the Committee that it—we would ask that it be sent directly to the floor rather than have a redundant meeting. Or, if there were changes, then we would have gone back to Committee but the Committee did, by a large margin, pass the bill.

I'm going to make some remarks that some of—some black people who do not know me and some white people might be — might be perceived — they oughtn't be — but might be perceived as racist. And because I am not a racist I wanted to just for a minute talk a little bit about my background.

I grew up in the segregationist South as most of you did. But it was something that my parents taught me and my brother and sister was wrong from the very beginning. My father, there are many instances I could cite to you, but he went out on the limb not to do radical things but to move race relations ahead many times. Had—I mean, he was berated at home, had threatening phone calls from some of the things he did. For instance, one of the things he did was to em—to put on the sales floor of our store the first black sales lady in the City of Asheville in the late fifties. My sister, Leslie,

who most of you all know, and I were reminiscing about this two nights ago and she told me a story about how, when she was just a little thing, just four or five years old. She was up on Pack Square and asked my mother why there were separate water fountains for colored people, as they said on the fountain, and white people. And my mother's response was, "it's wrong." We were always taught that it was wrong to treat people differently because of the color of their skin, it is something that I have believed my whole life.

Now let me get to this bill. I talked about those things because I am an angry Senator. I have been before you, I can remember on one occasion, and probably others, when because of circumstances it was necessary for me to try to lead you into something that I, personally, perceived as bad for North Carolina. Cutting—taxing State employees [sic] retirees is the one that I remember that I thought was bad — but that we just had to do it.

This bill, I think, is not only bad, I think it is terrible for North Carolina. I think it is bad for Democrats and Republicans, for whites and blacks, and all of us. And, I am angry that we're in the position and I have been asked—or put in the position where I have to lead the charge to ask you to vote for something that I think is terrible. I think it is contorted. And I think it artistically looks bad, although that doesn't bother me as much as it does editorial writers. I think the districts are not as compact as they should be. I think that the Bush administration has, for reasons I which I will — will put reason on them later in this talk, has forced us to do things that the Voting Rights Act does not require and which are bad for the State but from which, on talking to the expert lawyers in the field, we have no practical remedy.

So, therefore, we get to a choice of making choices between bad options. And this is a bad option but it is not as bad as some of the options that I have seen.

My mother, who has been a liberal Democrat all her life, before I came down here took one look at the plan which had been sent out which is essentially the same with some changes and compromises in it and said, "it looks like we're going back to segregation again." It looks like—and this is the first time not in the News and Observer's editorial that I had heard this phrase used in connection with this, that what the Justice Department has required is that we go back to "separate-but-equal." And I—that goes against every grain in my body as to what society ought to be heading for. Now, I realize that this bill, in all probability—it certainly will give the black people in two districts the choice of a Congressman. And I presume that in the next election or some election they will elect black Congressmen and I have no objection if there are twelve black Congressmen from this State, but I think those who think [3] that is a gain for the black people of this State to have segregated districts are being very shortsighted to the goal of having a society in which people are treated for their worth or un-worth and not because of what the color of their skin is.

I am angry at the Bush administration. I am not angry at any Republican in here. This is a partisan Body and no matter how you do it — whether it be by commission as I've talked to people in other states — or how you do it, it ends up to be a partisan process. And I'm not angry at any Republican, 'cause I probably would have done the same to use — or attempt to use the Voting Rights Act to put Democrats together so Republicans can be elected. There's nothing—that's part of what legislation's about.

But the Justice Department ought to be above that. They ought to not distort that law for any purpose. And I'm satisfied that they have done that. And I'm satisfied that they have done it intentionally, and I've never heard any refutation of the rumors in what I'm going to tell you the history of this is. I'm going to tell you what's

rumor and what I know from my own eyes because I think those are distinct and I think the rumors may not be true. But they've not been refuted and I've said them before.

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And, consequently, we enacted a plan that was distorted and we got highly criticized for it. And now I must put forth before you a plan that's even more distorted. And we'll get criticized for it, again. But it is not anything that many of us in here, if any, would want to do if we had a choice. I don't know of anybody in here who does not want to draw compact, regular shaped districts with this less cutting counties in two. The last plan, at least, didn't cut them in three but when you get to putting these districts together you end up—I mean putting two districts you end up with places that you have to cut them in three. And I think that that's bad and I think that everybody in here thinks it bad.

The—but we've been placed in a position that, as I've said, that I think is terrible. We passed a plan with one black district. Even though I, personally, think the law didn't require that the way our geography is. But it, at least, was arguable. If you look at the map of where black-majority precincts are, you find little pockets of them all over the State, but a massive area in the northeast where there are many of them.

And we sent it to Justice and there was some concern among many of us that the House and the Senate Plan may come back for reasons—particularly the House Plan that Senator Shaw elaborated at the time. But no one, that I know of, even conceived that the Congressional Plan was coming [4] back. There was no way to draw a second black-district that didn't, first of all, look like an absurdity and secondly, besides the looks of it it required picking a little pocket of blacks here and going down the road or through a field or by a telephone line, or what

river and picking up another little pocket of black people and taking the blacks out of one community and tying them together with the blacks of another.

And there is nothing in the Voting Rights Act, in my opinion and in most of the people that I've talked to who understand the Act, that requires that. Nothing. What the Voting Rights Act says is when you have a big enough concentration of blacks, or any minority, to form a majority that you may not deprive that group of a majority by fracturing them into different districts or by submerging them into multi-member districts. It doesn't refer in any way to going and making a string of islands together to form a district.

So no one took, really, even though David Balmer had drawn three different plans that had second black districts all of them did what I've just said and nobody took that that there was a serious possibility that the Justice Department was going to turn it down.

Now. Rumor has it, and it's been publicly rumored and I've heard no refutation of it that shortly after we enacted that plan that the four Republican Congressmen from North Carolina had a conference with John Dunne asking him to require is [sic] to put in a second black Congressional district. I believe that is true. It may not be, but I believe it to be true.

* * * *

And, then about a week or ten days maybe before December 18 we started hearing rumors that they had—that they were going to force us to adopt the Balmer district that ran from Wilmington to Charlotte. Even though, I think we had given them fairly good evidence that in primaries—and that's a very Democratic area of the State—but in primaries the Lumbees and blacks, historically, had not voted together and, therefore, it really wasn't a district of minority control even though together there were more minorities than whites.

I still didn't believe it. About a few days before the 18th, I got a call from Mr. Cohen, or my sister—I can't even remember which, who said that the Justice Department has requested that we go up there and talk to them again. And we did. On December 17th, Mr. Cohen, my sister, and I, Representative Fitch, and the Speaker when to Washington, at the State's expense, and when I got there and sat in the meeting for five minutes—first time I had met Mr. Dunne, and there was much of their staff there—I knew that they had already made up their mind. And I could not figure out why they called us up there and don't understand that to this day.

And Mr. Dunne, some of the staff asked a question or two or said—made an occasional comment, Mr. Dunne did most of the talking. The essence of what he said at that meeting was — and he said this in different ways over, and over, and over again — you have twenty-two percent black people in this State, you must have as close to twenty-two percent black Congressmen, or black Congressional Districts in this State. Quotas. Here is the Bush administration who from the very beginning has been screaming about quotas. When it is to their advantage so they can elect some Republican congressmen, all of a sudden they are for quotas.

And I want to tell you that I was not a great admirer of John East. But when John East was in the United States Senate and the Voting Rights Act was before it, John East, if my memory serves me correctly, on the Senate floor said the day will come that this will lead to in voting districts is quotas. And nobody paid any attention to him but he was dead right. And I'm telling you that it is dead wrong to do that.

[5] It is a deliberate distortion by the Bush administration of the Voting Rights Act because, in my opinion, Representative Coble's district was shaky; because Representative McMillan's district wasn't as safe as they

would like for it to have been although it would have been hard to make it much safer with the size it was without pulling the blacks out; and because we had not made the Democrat district shaky enough. And they accomplished what they wanted to do in this plan. Because Representative McMillan's district is now totally safe, and Representative Coble's district is totally safe, and Representative Hefner's district and Representative Neal's district have been clearly made shakier. But it's wrong, folks. And we are going to get—Democrats in here are going to get the blame for this plan. But we're being forced into it and that's all there is to it.

Now, I want to get off that for a minute and talk a little bit about the political aspects of this plan. In my view, it's going to—you know, it's going to be criticized for gerrymandering. Any plan we passed would have been criticized for gerrymandering. And if the Republicans had a majority, and they passed a plan, we would have been criticizing them for gerrymandering.

But, if you really look at it, and if you take all the incumbents out and pretend that there are no incumbents running because obviously we all know that incumbency has a lot to do with electing Congressmen, what you have is three safe Republican districts and three safe Democratic districts and one district, the Fourth District, that is—if the Democrats has [sic] a decent candidate is a safe district, though, though it has been shown that Wake County which dominates the District will vote Republican as they did for Governor Martin, so you can't say that that's totally safe; but that would certainly be a strongly leaning Democrat district. And the other five districts cannot be characterized any way except swing districts, if you take the incumbents out of them. With the incumbents in them, you would expect incumbents to win them—I would expect incumbents to win them all, unless you've got a landslide of the party, you know the opposite party in the other direction.

In any event, the plan, in my opinion, from a party point of view—though, you know I'm a Democrat and I obviously cared more about protecting my folks than the back row's folks—it is basically fair from a party point of view. It is still bad from a geographical point of view. And I don't think there is a doggone thing we can do about it.

Now, before I sit down — and I have gone past the rule of what I can say—talk in length of time and so I'm going to sit down quickly — I do want to comment about this plan relative to other two-minority-district plans which I have seen.

I think that this plan is better, even though it's bad, is better than the other plans I have seen for the following reasons.

First of all, there are clear minority majorities. In one district, in the Second District it is over fifty-two percent of registration black and in the Twelfth District over fifty-four percent of registration black; both of them substantially exceed the district that we passed the first time which the Justice Department had said was okay. So, if they are at all consistent with that they have to say these two districts are okay.

And, every plan—although some other plans had similar features, every plan did not have those clear majorities and particularly, I would point out Balmer's Wilmington to Charlotte district which had a lower percentage even combined with Lumbees and blacks. And certainly you've got to make the case of historically voting together to make it a minority district.

It is also better, in my opinion, because—even though it's bad—I want you, and never to think that I think this is a good plan, because I think that it's a bad plan, but it is better than the other plans that I have seen because it does not mix the Piedmont with the East. There is some general sense of similar interest even though they are

not, in my opinion, of the same community, but at least, similar interests in both of those districts in that the Twelfth District is clearly an urban district with eighty percent of the people being from cities of 20,000 or more and being only in the Piedmont; and, the eastern district which I think is the [6] worst of the two of them from far as compactness being rural, being the great majority—I've forgotten the number, eighty percent or something like that—under towns, not being in towns of 20,000 or more. So there is, at least, a similarity of interest which I have not seen in any other plan.

The closest one was Representative Justice's [sic] district which went from Charlotte to Raleigh, and through Fayetteville, but it went through a great deal of rural area and, therefore, did hot have as much of a community of interest, in my opinion.

It, also, is better because it is more — even though it isn't compact, it is more compact than the other plans were. You know it takes four hours to drive from Charlotte to Wilmington. The plan is thirty or forty miles longer from Charlotte to Raleigh than either of these I-85 plans. And the I-85 plan's a three-hour long district. It's no longer than my current Eleventh District, in fact, it's shorter. I think people are annoyed at that district for compactness because it's narrow—not 'cause of its length. I mean, it's obviously long compared to its width. But that's not the test of compactness. The people are fairly close.

So for those three reasons, that there are clear black majorities, that they don't mix the East and the Piedmont, and because there is some kind of similarity of interest of its people, I believe that this plan is the best of the worst. The best—bad, but not as bad as the others. And, therefore, I have to recommend you to vote for it — even though I think it's bad for North Carolina, because I think was [sic] have no viable alternative. Going to court is not a viable alternative. The lawyers —

I mean, at least what our experts say — the experts we've contacted in Washington say the odds are ten to one against us winning if we go to court, it's no use going and spending several hundred thousand dollars in something you are going to ultimately lose. We need to get this behind us for everybody's sake and so I would urge you to vote for the bill.

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[6] Lt. Governor: If there are no objections, I would just like to make a few comments since I think I bring probably the best perspective on redistricting of any member sitting here today. Senator Winner, there's no doubt in my mind whatsoever that everything that you've said was spoken from the bottom of your heart and was true. But I have a long memory. And I remember what has happened in the past by this Body and the adjoining Body that affected Republicans running in the State of North Carolina.

I think back to 1952 when Congressman Charles Jonas was elected by the people of his District and then a series of changing the districts on a totally partisan, unfair basis went on year after year until finally your Party gave up and realized the people of that area wanted Charles Raper Jonas to join them in the United States Congress.

Then along in 1962, Jim Broyhill came along. Identically the same thing happened again, again, and again. And a fellow by the name of Jim Gardner came along from Nash County—an area that the Democrat Party had always controlled in this State for years. And I ran for Congress in 1964 and got forty-eight percent of the vote. I did not win. And I went up and congratulated Congressman Cooley, at that time, on the fact that he was the better man. But I also made a determination that I would run again in 1966. The General Assembly, led by your Party, came in 1965 and changed the District so

that they thought it would be impossible for a Republican to be elected to represent the Fourth Congressional District. We crossed them up — we being the people. And I was elected in 1966 by a large majority.

[7] I went to Washington to serve in the United States Congress with a very young family at some great personal sacrifice. This same body in a very short time changed the playing field again, took out my home town of Nash County out of the Fourth Congressional District that I had been elected to represent the people and put it into the Second Congressional District with my neighbor L.H. Fountain.

So when I sit here today in 1992 and hear people talking about the Bush administration and fairness, I have a hard time sitting here and that's why I asked for the opportunity to stand up and speak. This issue of redistricting has been a partisan issue used by the Democrat Party for years to their advantage. And now, you're in a bind. You gotta answer to somebody else who is carrying out the mandates of the Democrat-controlled United States Congress who voted for the bill.

I would suggest that if you're unhappy, any of you, with the Justice Department, be it Bush's or anybody else, take 'em to court. Have your day in court, let the courts decide what's fair and what's not fair. I hate to see us waste any money any more than anybody else, but there hadn't been any lack of effort to waste it up until now. We've spent an incredible amount of money to send plans that were rejected and sent back. If you don't trust the Justice Department, then take them to court.

But this problem of redistricting, I can tell you firsthand how unfair it's been. I went through it. I appreciate the opportunity of addressing the Body today. Senator Kincaid.

Senator Kincaid: Thank you, Mr. President, and members of the Senate. I appreciate the opportunity to

talk on this bill. I'm confident the remarks that Senator Winner stated were from his heart. And what I say is going to be from my heart.

And like Senator Winner I think I need to preface my remarks by stating a little about myself. I don't think I've mentioned this on the floor of this Senate before, but back in 1967, when I was a high school teacher, I had the opportunity to teach the first integrated class in Caldwell County. And I saw firsthand how inferior the black schools were at that time. And how we were moving in the right direction with the integrated schools.

So I've seen it. And like Senator Winner stated the remarks I make to you Senators today are not intended, definitely, as a racist. But I'm concerned about what we're attempting to do by this bill. Obviously, I'm a layman. I don't have the legal knowledge of court decisions in the past; the Supreme Court decisions and even the Justice Department itself. I can only see what I read with a little interpretation. And like I mentioned the other day on the floor in a question, I'm still looking at the reply the Justice Department sent to us whereby they state that they don't require any jurisdiction guaranteed minority voters racial ethnic proportional results. Just that they have an equal chance.

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[8] I recall at fairs in Caldwell County and Burke County—Burke County in particular—last three or four elections because Burke has been splintered legislatively; lower part of the County has representatives, upper part has other representatives—and the same thing in Avery County except the congressional candidates are split. But I recall going to fairs and those candidates running for the House or those candidates running for Congress would have to meet that particular voter at the fair and say, "I'm Joe Blow and I'm running for the Senate. Where do you live?" They'd say, "Oh, I live up in this

particular section—." "I'm sorry, you can't vote for me." Then they would go on to the next one. That's the way you have to campaign under these splintered dele--situlations [sic]. It's not the best way to do it.

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Now, the political part. Obviously, there is a political part of the bill. Senator Winner, I don't see how you say that in the bill—for instance, this is another thing that bothers me because Caldwell County will now be split—you stated that Representative Neal's position would be weakened. Well let me tell you how it would be weakened. If you look at your map, and look at the Fifth Congressional District, you see Representative Neal's district starts way over in — looks like Vance County just to the right of Rockingham. Senator Daniel, it's over pretty close to your territory. Then it runs all the way across the Virginia line, to Tennessee line, and then it drops down into Watauga; and would you believe, by coincidence, it then goes into Caldwell County — my County — and only picks up the Democrat precincts; heavily Democratic precincts. I see what Mr. Cohen was doing. And then it moves on down into Burke County; and in Burke County it also picks up heavily Democratic precincts. It will be tough on Congressman Neal in a primary but there's no way a Republican can win that district. Number one.

And Number two it disenfranchises my people in Caldwell County because they're not going to know who their congressman is. We're split now. There's no way we'd know who our congressman is. And Senator Winner also stated that — and quite frankly I didn't like the Balmer program; I think Balmer's bill was just about as bad as these — I don't like that approach. Senator Winner stated that in this proposal it's more compact. You don't have no three or four-hundred mile territory. I just described the Fifth. And the Fifth contacts eastern, Piedmont, and mountain counties. And if it were

not for Rutherford County, it would—the Fifth Congressional District would be the Virginia line, the Tennessee line, and the South Carolina line. That is not compactness.

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[9] Senator Shaw: Mr. President, I rise, not to speak as the Senate Minority Leader, in fact not even as a Republican. But I would like to pose this to the Body as a staffer the Civil Rights Division of the Justice Department might pose some questions to this Body.

I had a map last week and I passed out several copies of it. And it was a unique map. It showed a black congressional district running almost from Charlotte down past New Hanover to Pender County. And it was an actual black congressional district. And a staffer might ask why has it taken this Body a hundred years to draw another if there was so much interest in helping the minorities. Why?

Why, when the Senate Minority member went to the Co-Chair of the Senate Redistricting Committee and said how many minority districts have you drawn? How many can you draw? And the answer was three. And the question was, is that all? And the answer was, yes. Then, at that time the Senate Minority Leader produced nine computer-drawn and all qualified but one.

And in the House, when you look at Guilford County, with 102,000 blacks, and there was just one House seat drawn for a minority. Over 65,000 blacks were put into three white incumbent districts—their voting power diluted. I'm sure if someone had polled those sixty-five to seventy thousand black people and said you're going to have a Democrat House member here another, which would you rather have—a black member or a white member? What would the answer have been?

I think there are some of the questions that staff at the Justice Department might have asked. And I don't

think those questions are political. I don't think they are Republican versus Democrat. I think they are good, honest questions that they could ask. And I think they are the type questions — not that I heard there, but similar to the ones I heard when I was up there. I, incidentally, paid my own way and so did everyone else on the trip along with the law firm that was hired to go. There was no expense to the State on that.

The answers that I got from staff when I said well what were the reasons that no more could be drawn—that none of the amendments were acted on? And the answer I got from the staffer was well, there weren't really any good ones.

I don't think the Bush administration had anything to do with that. The Bush administration didn't have anything to do with the past hundred years of this Body not having created a black congressional district. The Bush administration did not have anything to do with not having created black Senatorial districts. And the Bush administration, certainly, didn't have anything to do with drawing that one black House district in Guilford County. From the conversation I listened to that day up there, the feeling I had was this, that had Guilford County been treated as it should have been for the minorities living there, and this is just an opinion, but all I heard while I was up there time after time after time, was Guilford County. And I didn't ask for it. I heard it.

Had two black districts been created for the House in Guilford County, in my opinion gentlemen and ladies, both the House and Senate plans would have come back here approved. Now I really, honest to God, believe that would have happened.

The congressional thing I think was doomed before we got there, Senator Winner. Because the young man that one of our Representatives there was talking with, I overheard him say, well I'm writing the answer now. Well, you don't write an answer unless you're going to

turn it down. So, I think that decision had been made before we got there.

Senator Winner: Mr. Preside—

Senator Winner, if I might, I did not interrupt you, sir, while you were speaking. So, I'm trying to be as non-political as possible because you know what's going to happen. The thing is [10] going to go up there and it's either going to pass or it's going to come back. The Republicans are going to look after Republicans in this area and Democrats are going to look after Democrats and we all know that's the way it's supposed to be. But I really think that some of the things I said are some of the reasons the Justice turned this down. And I don't think George Bush probably even knows where Guilford County is — I mean, his wife knows where Guilford County is, she buys furniture there, bless her heart — but I don't really think it was political from that end. Thank you.

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Senator Hunt: Thank you, Mr. President. Ladies and gentlemen of the Senate. Personally, I think it's extremely unfortunate that the tone has been set here for us to debate a redistricting bill based on our partisan politics and who should be blamed for it. Now, you know we are talking about to the question as to whether or not black people are going to be able to participate in the arena where decisions are made that have a major impact upon them. And it seems to me that the debate has swung not directed toward that particular question, but if it takes place who is going to be blamed.

Now let me tell you here. I stand today to speak in support of this bill. I speak in support of it from a personal standpoint of view. But Senator Winner, I also speak in support of it because I know among all of those who support it there is an extremely loyal, perhaps the most loyal group of Democrats in this State who support

this. And they will be happy — and some of us represent them as Democrats — will be happy to take the blame for this particular bill. I don't know whether you were talking about that block of loyal Democrats or not. But, they do not look at it as a bad bill.

They look at it as a bill which should have taken place years and years ago—even during the period of separation but equal. And let me just talk — it's ironic that you would mention separate-but-equal. Because you mentioned it in the presence of a number of us but I can speak to myself as being a product — and then after being a product, a participant in that system referred to as separate-but-equal. And I can deal with it from the educational standpoint of view, from the elementary grades up through the completion of secondary school, where I became a participant.

Let me just talk to you about separate-but-equal a little bit and show you how much there's a similarity in that as it related to our educational process and now as it relates to our political process. Back then, you know — and somebody over in this area referred to the, the degradation suffered by black people because of that, so called, separate-but-equal — and I wonder what the situation would be now had we had genuinely a process that could be referred to as separate-but-equal. But to the contrary, separate—yes, but unequal in reality.

[11] We are talking about books handed down after the black schools placed their orders for new books. Those from the white schools were sent to the black schools, the used ones, and the new orders were sent to the white schools. The desks were the same way. In my situation, we instituted while I was a student a course in black history, back in the 40's. And because of the all-white school board, at that time, an all-white administration — they had us to strike that from our curriculum simply because we were not to learn a great deal about our history. We are talking about separate-but-equal.

And, of course, our educational system was administered as it was then simply because there were not black people in the process to have input and be aware and take care of the interest of black people at that time.

I asked my Congressman, currently, in the Second District, Congressman Tim Valentine — and there were others in the Body who were present when I raised the question of time, and you know the Second District has a large percentage of black people in it — "Congressman Valentine, how many black people do you have on your entire staff—anywhere in this Nation, whether it be in Washington or whether it be back in your North Carolina District?" He said, "None." I said, "Congressman Valentine, then" —and this was recently— "why is it that you do not have black people from this District which has a large percentage of blacks as your constituents in this District, why do you not have blacks on your staff?" Well, his answer to me was, "Well, we hire according to qualifications." Well, to me that's not a bad answer, but it's not good enough an answer to me.

Now, at the present time, we have eleven and soon to be we will have twelve congressional representatives from the State of North Carolina. To me it makes sense that because of th—and we are not talking about quotas, we are talking in my way of thinking what's practical. We are talking about a group of people who constitute twenty-two percent of the citizens of this State and we are beginning to talk about jaggered lines. We have know jaggered lines, crooked lines, meandering lines all along. But they have served different purposes.

They have served to practice and effectuate the politics of exclusion. But now, when we begin to talk about the politics of inclusion jaggered, crooked, meandering and curved lines become a big question in the minds of lots and lots of people. The question as to, you know, the partisan politics involved in this. The Republicans did it. The Democrats did it. Why did you do it? Jus-

tice Department—and these kinds of things. Well, to me it's not important who did it. The question was with Abraham Lincoln, who was a Republican, and I'm not here to speak in favor or against any group of people. We all know Abraham Lincoln was a Republican. And the question was, well, he didn't free the slaves, for slaves to be free, he had another motivation. Well, regardless of what his motivation was, to me it was a good idea! It turned out to be a great idea! (Laughter)

Whose-ever idea it is and whoever it is that's promoting the idea of having black people to break down what has been referred to as separate-but-equal but in fact, yes, separation but inequality. And that's what this bill will help to do! It will help to further the breakdown separate—but the old separate-but-equal doctrine when it in fact was never equal. And right now it is not equal. In providing an opportunity for black people to participate in the process, a process which has and will have a major impact upon the lives, upon the life styles, upon the quality of life that black people will enjoy but cannot be anything but right and well doing in such a process.

Now, for the life of me, I'm not able to see how anybody, absolutely anyone, would be able to refer to such a process and a concept as a bad idea, regardless to whose idea it is. You see. Listen, this is not our mothers' and this is not our fathers' redistricting plan. This is a new generation of redistricting plans. And we must proceed and understand that this redistricting plan will reflect directly in terms of what we, individually, believe. Notwithstanding the fact that we might refer to what our mothers and fathers believed.

So, I'm saying the time has long since come that we face the facts here. You know, ideally the Justice Department should not need to even be involved in this. Whether the Justice Department is Republican, Democrat, or independent. Because it's something because

North Carolina and several other states never took the initiative to do, the Justice Department became involved. And we are here today debating that question and it's being referred to as a bad idea. I think it's a great idea, Mr. President and ladies and gentlemen of the Senate. I think it's way [12] overdue! I think a great deal of the debate and discussion at the time we have been sitting here—lots of us doing nothing—has been simply because there have been efforts to find a way not to do this.

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Senator Ballance: Thank you, Mr. President. Senator Barnes, colleagues. The question today is how do we measure progress. One of the questions might be. And do you do it by looking at the gross national product, housing starts, or do you try and decide how many blacks attend the formerly all-white universities, even high schools? Well, there's another side to the story. And that is whether or not we look at the human factor. And that is how we treat our fellow citizens, indeed our neighbors when we see them on the Jericho Road. And whether or not we pass by on the other side.

I stand today, Senator Shaw, as a former Republican—now a good Democrat, but I stand first as an African-American. And while I appreciate all of my colleagues of both Parties and where they stand on issues, I have some concern about credibility when some of my Republican friends tell me that they can draw a plan that creates three black congressional districts. And I look at the record and find that they voted against the Martin Luther King bill—Holiday bill. And I look at the record and find that all of my good Democrat friends have some problem with credibility when they say to me don't take all the black folk out of my district. But when they get elected by those same black Americans, they many times vote on legislation without regard to the make-up of their constituency.

And so we ought to be concerned about that question of credibility. And you may ask yourself well, Mr. Ballance, who are you, Senator? Well, I'll tell you in the words of the poet.

> I'm the one who worked in the fields, bringing the cotton and corn to yield;
> I'm the one who worked as a slave, beaten and mistreated for the work that I gave.

But the same poet wrote another poem and he said:

> I, too, sing America; and I, too, am an American.

And when I got up this morning, I got up in my own bed in my own house. And I drove down here today in my own car. And I wasn't very concerned about being stopped on the highway by the Highway Patrol, or being beaten or detained, because my American citizenship protects me. The Bill of Rights says, ". . . we hold these truths to be self evident, that all men are created equal; . . ." and ". . . they are endowed by their Creator with certain unalienable rights; . . ."—Declaration of Independence—and ". . . among the[m] are life, liberty, . . . and the pursuit of happiness. . . ."

We are talking about a bill that was passed by the United States Congress. And I read it recently, it's called the Voting Rights Act of 1965. It's been amended. This is remedial legislation. The reason Congress has to pass this bill is that we were not recognizing the Fourteenth Amendment or the Fifteenth Amendment and citizens who came from Africa involuntarily were not being afforded their Constitutional rights.

And so, we don't come today to try to draw lines that will benefit the Republican Party or the Democratic Party. And Senator Winner, I would—I would agree, to a certain extent, it is unfortunate that we have to draw lines. But, you know I got to where I am standing right now after the Gingles Decision. And in 1980, this Body,

the General Assembly in the 80's met four times before we got a plan that was approved by the Justice Department. And in the interim Ralph Gingles, I believe from Gastonia, brought a lawsuit. And before that we had met and passed a Constitutional amendment that says we could not divide counties. After the lawsuit was filed, we had forgotten to pre-clear that piece of legislation and we did that—sent it in, but it was not precleared. And then we went to the Fourth Circuit—well, I'll say United States [13] District Court, three-judge panel; and they wrote the Gingles Decision. And yes, they said that black Americans are not entitled to a guaranteed seat anywhere.

But that's not what we're talking about. We're talking about an opportunity. Now, I don't want to talk too long, but I want to talk about, as I close here, two African-Americans. One was born in Warren County, North Carolina, was a slave. And he was taught to read and write by a white family known as the Kings. And for their good deed, they were taken down to the railway station, and placed on a train and had a sign hung around their neck that said "nigger lovers." John Hyman was sold into slavery out of Warren County, but he came back to Warrenton after the—around the 1860's. And he started to tell black people newly freed that they had a right to vote. And for that he was called an agitator. He was later elected to the House of Representatives here in North Carolina, and then to the Senate, and he was the first black man in North Carolina elected to Congress.

And then the second gentleman I want to talk about briefly is George Henry White. And he was born in Rosedale, North Carolina. I don't know whose district that's in. But he went to Howard University, studied law, and then he went down to Wilmington, North Carolina, after passing the Bar—excuse me, to New Bern, North Carolina, and opened a law practice. And he

practiced law and later became Solicitor in the Second District. And he was later elected to the State House, and the State Senate, and he was elected to Congress in 1896, and again in 1898. And in 1898, he was the only black American in the United States Congress.

Now, you know, they had a debate on reapportionment. I don't know how I came about, Senator Winner, but-uh-I have in my hand a copy of the Congressional Record from January 29th, 1901. And Congressman White stood up to speak on that day and I guess they were debating the agricultural bill. And he talked about three or four minutes about the agricultural bill and then he said, I'm going to use the rest of my time to speak because last week when you were debating the reapportionment, one of my colleagues from North Carolina, Mr. Kitchin, and some of my other colleagues has [sic] a lot to say about black people. And they made some rather scurrilous [remarks] about them and I could not even answer those remarks, Mr. President, because he was not recognized to speak on that occasion. So he had to wait until he got the floor and he went back and debated the issue at the time and he said, if you will bear with me, "I want to enter a plea for the colored man and colored woman, the colored boy, and the colored girl of the country." And he went on—he made an eloquent speech and he talked about the progress that had been made in thirty-four years from slavery and how the illiteracy rate among black people had been decreased by forty-five percent in that short period of time. And how much money blacks had put into schools and colleges and into homes.

And one thing I do want to share with you, if you will bear with me, he talked about an election in North Carolina in the town where this young man, gentleman, was born. "In August last, at the election in Scotland Neck, North Carolina, which had registered white vote of 395 most of whom were, of course, Democrats and a registered colored vote of 534, virtually all, if not all of

whom were Republicans. When the count was announced, however, there were 831 Democrats to 75 Republicans. But in the Town of Halifax in the same count, the results were much more pronounced. In that Town the registered Republican vote was 345, and the total registered vote for the township was 539. But when the count was announced it stood 990 Democrats to 41 Republicans; or 492 more Democrats voted than were registered." And so you can understand how he lost that election, he was a Republican, by the way.

But the final thing he said which has sort of become famous in his remarks in this speech, some call it his valedictorian speech—Mickey Michaux has probably quoted him, and I am to going to close with these remarks, Mr. Chairman, and I do support this bill even though it meanders somewhat, it's a remedial piece of legislation. There may come a time when we can come back here and do away with the so-called black districts and can elect people based on their qualifications, but Congressman White said this on the floor in 1901.

> "Mr. Chairman, this is perhaps the Negro's temporary farewell to the American Congress. But let me say, phoenix-like he will rise up some day and come again. These parting words are in behalf of an outraged, heartbroken, bruised and bleeding but God-fearing people, faithful, industrious, loyal people, rising people full of potential force. Mr. [14] Chairman, in the trial of Lord Bacon, when the court disturbed the counsel for the defendant, Sir Walter Raleigh, raised himself up to his full height and addressing the court said, 'Sir, I am pleading for the life of a human being.' " Mr. White continued, "The only apology that I have to make for the earnestness with which I have spoken is that I am pleading for the life, the liberty, the future happiness, manhood and suffrage of one-eighth of the entire population of the United States."

Mr. White lost the election. He went on to move to Washington, D.C. and invested and created an all-black town called Whitesboro, New Jersey. He died and was buried in Philadelphia. And finally I was coming out of New Bern one day, back when I was thinking about running for Congress, and I saw a sign that said GEORGE H. WHITE. I knew about Mr. White and knew where he had worked and I want to give the historical people credit; and I applied brakes and turned around and went back and read the sign. And in Warren County on Main Street there is a sign put up by our historical people that mention[s] JOHN ADAMS HYMAN. Thank you, very much.

Lt. Governor: Senator Simpson.

Senator Simpson: Mr. President. Mr. President, ladies and gentlemen of the Senate. I want to speak just briefly on the bill. I'm not going to try to speak as a lawyer versed in congressional or any other kind of redistricting. Because I haven't even read the Gingles Case and I don't know much about it. But, Senator Soles, with the rates they paid for the last court case we had, a million, three—it'd probably be two now, I'd learn to be a congressional redistricting lawyer.

But, I've thought a great deal about the bill that's been presented to us and how I ought to react and how I ought to vote. And I remember one time reading in the Old Testament that the sins of the fathers would be visited upon the children unto the seventh generation and I couldn't ever understand that, Senator Ballance. If my father shot someone, then I'd in turn be sent to jail for it. It didn't make much sense to me. But I heard a sermon one time. And from what I heard from that preacher, we are not wrestling, those of us of the white race, are now wrestling with the sins that we committed against the black man years ago.

And I'll say this, also, that I want the black people of this State to have two congressmen in the United States

Congress. I think they deserve it. The question how do we do it without defying the laws of geography and the logistics and without ignoring commonality of interest and contiguity of territory. And I'm not sure I know how to do that. But Senator Winner, I think that if we left the politics out of it and, and went to a computer and quit trying to protect incumbents whether it's Cass Ballenger or Tim Valentine or whoever it is, but let's create these two districts without regard to partisan politics whatsoever. I noticed the Wall Street Journal said on the first one we created was computer generated pornography, it might of been pornography but it wasn't computer generated. Computer's don't come out with anything that isn't put in them. If it's pornography somebody else created it.

But, if we would go to the—Gerry Cohen and Leslie Winner and say, "Look, we want two black districts and we want the rest of the State divided up geographically compact with the people having commonality of interest with the districts being contiguous," I think we would come back with something that would do exactly what we want to do. And exactly what ought to be done. We haven't done that. When you've got one district dividing two others with maybe some one point at a crossroads the districts being contiguous, when that isn't necessary to create a black district, then we are not serving what—the people of this State, we're not giving them what they want and what they're entitled to have.

And what I'm afraid of is the way that we've approached this project, that we are increasing the disdain and the revulsion that a lot of the people of this State have for politics and government. And I don't really think that's necessary. I don't think that—that people in one end of the State who may never see another congressman ought to be required to have to acquaint themselves with the—a congressman who lives two hundred miles away. And I don't think it was necessary

in the Fifth District to run from Glen Alpine to Kernersville where it takes two hours to go on an interstate highway at 65 miles per hour. I don't think all that's necessary.

[15] And I think that what we're doing with the way we're approaching this subject is severely injuring the whole concept of representative government as we have known it. We may be like the flies that are—that are—that are planting their eggs that will create maggots that will eventually eat the entrails out of the representative forms of government as we know them and as our people are entitled to.

You may say, oh well, this is just one redistricting plan. It isn't important. It won't [have] that effect. If it's one nail in the coffin of representative government, and we helped put it there, that's too many!! And I think we ought to back up, Senator Winner, I think we ought to go home; I think we ought to tell the staff to create us one without any regards to incumbency; without any regards to partisan politics, and I assure you we will come back and have a plan that will protect representative government and we can all be proud. We may lose a few of our friends from seats in Congress, but I think we would then have truly accomplished something for this State and this Nation. And because we haven't done that I'm voting against this bill.

[15] Senator Martin/Guilford: Mr. President.

Lt. Governor: Senator Martin.

Senator Martin/Guilford: Request permission to debate the bill.

Lt. Governor: You have the floor.

Senator Martin/Guilford: Mr. President and Members of the Senate. I'd like to speak in favor of the bill. A lot of the things we've been talking about here today, I

guess, relate to the contrast between what is ideal and what is reality. A lot has been said in terms of what would be an ideal situation, such as if a redistricting plan could be drawn without consideration to partisan politics. However, we all know that the redistricting process is one that is partisan and whoever happens to be the Party in power at that time usually seeks to influence the outcome of the districts in the manner that's favorable.

At the same time, there's been a lot of discussion in terms of an ideal situation in which we should not have to have a Voting Rights Act; where there should not have to be a submission of two predominantly black congressional districts. Again, however, the reality of the situation dictates something different. It dictates that we do exactly what we are in the process of doing now.

In order to come up with the plan that has two predominantly black districts in which there's a reasonable opportunity for black persons to be elected or for black citizens within those districts to have significant deter—possibility of determining who will be representing them, we have to do pretty much what we have been doing in this entire process. A lot of concern has been raised about whether or not this is going to be the demise of representative government. Whether or not this is going to lead us back to a sick situation of segregation, separate-but-equal, and I would say the answer to both of those is no.

I don't think that this plan will lead to the demise of representative government. The way that it is drawn even when you consider the effect of incumbencies, it might not look too nice on the maps and in the newspapers but at the same time, the way it's drawn I think most people in the districts that are drawn do want the people who are currently representing them to do so. At least, someone that has a similar philosophy, similar interests in terms of what their concerns are. So, I think

that it's not going to cause a demise of representative government.

By the same token, I don't think it's going to lead to a situation of segregation—political segregation. I guess you could define political segregation as a situation where you have voters, but there is not any power or not any control in terms of what happens when that vote is cast. By having two districts that are drawn in which you have black members representing a majority of black people, you have the voting, you have the numbers, but you do have the power, you do have the control, because those persons will have some influence on what happens in Congress; will have some influence on what happens in representation of their constituencies; and I think, again, that would contrast with the idea of segregation.

And, again, those districts are not totally black. They're [sic] substantial numbers of white population within those districts; roughly forty-five percent on the average. So, therefore, it's going to be a situation where everyone gets used to the idea of operating within the [16] context of where they have a black congressman, or congresswoman, whatever the case might be, and as has happened in the General Assembly when we first, after the redistricting in 1982, before there were significant numbers of blacks elected to the General Assembly—the House or the Senate. I'm sure there were a lot of people in the general public, and probably a number of people who actually in the General Assembly, that had some concerns about how competent will this fellow or that lady be? How well will they be able to represent us? Will they be quality people like we are? And a lot of the people who are represented by these individuals probably might of had some questions, can I depend upon those persons making good decisions—sound judgment?

Now, while we might not always agree upon what actions are taken, I believe that all of you, or most of you, here and in the House have found that as a result

of the black members who have been elected I think you probably feel more comfortable than you would have before any of us were here. You probably feel more comfortable in knowing that the decisions that we make, the policies that we push, are similar in many respects to the same things that you would do and are representative. At the same time, you can expect that there will be certain special interests, ideas that we would push and hopefully, you will see the merits of those.

In essence, what I am saying is that given the time, I don't believe that we will have a situation again of political segregation with these districts. And who knows, ultimately, as a result of those higher expectations and those aspirations that will begin to be fulfilled by people who have, in fact, been disenfranchised but not necessarily being able to determine who is going to represent them. As a result of this, these higher expectations and aspirations, we could lead to a situation where several people have mentioned we would not need to have a continued drawing of lines in which we have to provide—go to special efforts to provide—go to special efforts to provide—an opportunity for any segment of the population being elected. Rather, it will become a natural course of events. That's ideal. We are not there now.

This is a situation of reality that can lead to that ideal. And I would hope that all of us would leave here with, not the concern of what damage this is going to do, but looking at the positive aspects that can come out of it for all of us and looking at it from the standpoint of well, we've done what was mandated. We've done what a number of citizens have desired and we have to all work together to make sure that we end up being able to reach that high ideal at a later point. Thank you.

Lt. Governor: Senator Daughtry, were you—on your feet a minute ago, and then Senator Odom?

Senator Daughtry: I yield to Senator Odom.

Senator Odom: Mr. President, I'd like to speak on the bill.

Lt. Governor: You have the floor.

Senator Odom: First of all, members of the Senate, I want to also commend Senator Winner and Senator Walker and the staff, especially Gerry Cohen, for what they have gone through over the last several weeks. They've done yeoman service for us and I hate to stand up here and say to this Body that I cannot support the plan that we have in front of us. And I have to do it for really three reasons.

First, I disagree with the interpretations of the law. I do not believe that the Voting Rights Act requires that we do this.

Secondly, I think it defies common sense.

And, lastly, it, in my judgment, will polarize Mecklenburg County and the City of Charlotte, contrary to what we have experienced over the last twenty to twenty-five years.

It's my judgment that the Justice Department of the United States in this six-page letter has made a mockery out of the 1965 Voting Rights Act. I have also read the Voting Rights Act. I've read the Gingles Decision. And first of all, the Gingles Decision deals with a different concept and that is multi-member districts. It doesn't deal with the concept that we have in front of us now. It's my understanding that there is no United States Supreme Court case that requires us to do what we are about to do and that is, erase commonality—erase common sense—and simply rely upon blind computer stupidity! And that's why I'm against it.

[17] We're here, in my judgment, because of one political appointee of Mr. Bush. And his name is John — better be sure I am right, I called him Joe Doe earlier — John Dunne. And I will challenge everyone of you with any common sense—

Senator Kincaid: Mr. President—

Senator Odom: (continuing) to read this letter—

Lt. Governor: Senator Kincaid, for what purpose do you arise:

Senator Kincaid: Will Senator Odom yield?

Lt. Governor: Senator Odom, would you yield?

Senator Odom: I will not yield. I will defy anyone to take this letter that came from the Justice Department and this is what everyone is referring to that is compelling us and driving this train that we're on to figure out how in the world he could have turned down the plan that we sent. There're only two references. There are no facts. There are no findings of fact. There are no conclusions of law. He says, ". . . The proposed configuration of the district boundary lines in the south-central to southeastern part of the State appear . . ." appear! No facts! Nothing! ". . . appear to minimize minority voting strength."

And then over on page five of this letter after talking about several other plans, he says, ". . . these alternatives and other variations identified in our analysis appear to provide the minority community with an opportunity to elect a second member of Congress of their choice to office. But despite this fact such configuration for a second majority minority congressional district was dismissed . . ." was dismissed ". . . for what appears to be pretextual reasons."

Ladies and gentlemen of this Body, what we have is no longer a government by law, but we've got government by one man making an interpretation for political reasons. And that's the only conclusion you can get when you read this letter.

Senator Winner said it correctly that our United States Justice Department should be above petty politics. And,

yes, we all recognize when legislative bodies get together, and this has been the case time immemorial, Mr. President, there is going to be partisan politics because that's the way our system of government is set up. But the Justice Department should not become a no-Justice Department and a political ram.

Senator Simpson, I did exactly what you are asking this body to do. I favor us having a least two minority-majority districts. And that would suit me if we had six. And I went to the staff and I'm sorry that I did now because I think that I wasted a lot of their time and a lot of their effort and that computer time, and I said create two minority districts in this State even with a variation of ten percent in populations and I don't want to know where any Congressman, Republican or Democrat, lives. But let me tell you what I want you to do. I don't want a county divided unless it absolutely has to be and I do not want a precinct or a neighborhood divided. Do you know what, Senator Simpson? You can't do it!! You absolutely cannot do it. Unless we get the law changed to where a congressman can represent non-contiguous areas. And that's where we're going.

And that's what Senator Winner said the former Senator East was talking about on the United States Senate floor. So, I'm telling you, there's no need to ask the staff and the computer to go do what you're saying, I've already tried it. Because I wanted—I even went to some of my Republican friends, and some of my minority-race friends and said let's see if we can't put together a plan that doesn't have any politics in it. And I was ready to do it. And the people in here that I talked to know I tried to do that. But you cannot do it under the present law.

This plan is bad! It does polarize the races in my judgment. It does—it will do, I think Senator Kincaid touched on and I agree with you, Senator, —if we had the districts that we now have only multimillionaires

will be able to run for Congress. There is no way humanly possible that a man or a woman is going to be able to put together an effective campaign that crosses several media market[s]. Not to talk about the time that it would take to campaign.

Now, what's the alternative? I've ranted and railed against the plan we're going to pass, I'm sure. The first is to submit to a plan that the no-Justice Department in Washington demands. The second alternative would be costly litigation. I originally said I wouldn't vote to go to court and spend the taxpayers money. But I am now convinced that we're going to go to court [18] whether we pass this plan or we don't go to—don't pass this plan, because somebody is not going to be happy. We're going to wind up in litigation. And if we are, I suggest we go ahead and face it head on. Because, there is no United States Supreme Court case that requires that we do what we're about to do.

Some of you may have gotten this and I just want to read just a small portion. There are twelve pages of a paper that was sent to me day before yesterday by a professor. His name is William E. Jackson, Jr. and I want to tell you he's a liberal Democrat, but he entitled his paper "Congressional Redistricting—An Abomination Against Liberal Democracy." And he gone on and sets forth all of his reasons. And I will let anyone see this afterwards that would like to.

But on page 2 of his paper, he says ". . . Is there not something utterly vicacious about representation in a democracy if voters in their communities face the specter of voting booths at so many pit stops along the Interstate 85 corridor in the most freshly carved district. Literally, they will have to check the census tracts to figure out which congressman represents them. In some cases depending upon whether the constituents live along the north-bound lane or the south-bound lane of the Highway." And he goes on and says this is a mockery of the system and I agree with him.

One of the problems I have, and I'm close to finishing up, is that our plan gets turned down and this letter says how are you to fix it. How do you fix it? Senator Hyde, it's like saying to you go build a house. Build it the best you can without a blueprint, without a drawing. And after you are through with it, if we don't like it, we'll make you tear it down and start all over again. And what we are about right now is the building of the second house and my judgment is it's going to be torn down by order of the so-called Justice Department.

My conclusion is this. I can't vote for something that takes away what we've done in Mecklenburg County and that is elect minorities without having districts—especially carved districts. I can't vote for a plan that takes the heart out of Mecklenburg County even if we would wind up getting a second member representing us to the United States House of Representatives but takes the heart out of the community that I love so much.

Secondly, I believe that the voters in our district and up and down these districts are going to become cynical, apathetic, even more than they are now. I cannot see us trading common sense for what appears to me to be computer stupidity! I don't want to go to court. I don't want to waste the taxpayer's [sic] money, but we are going to wind up going there and I'd just as soon go now and go on my terms than later, [—]

* * * *

[19] Senator Lee: Mr. President, and Members of the Senate. I have hesitated to rise, but as I do my mind goes back to 1968, my first entrance into the political arena as a campaign manager for Reginald Hawkins, who ran for Governor at that time. It was the first opportunity that I had to travel the State, get to know many of its people, and to cut my teeth.

It was also the same year that a young lady by the name of Eva Clayton from Warrenton ran for Congress in

the Second District — and did quite well, I though[t], in a not a majority-minority district, but certainly a heavily populated minority district. It was in 1972 that I had expected to announce plans to run for Congress in the Fourth District, which at that time consisted of Wake, Durham, Orange, and parts of Chatham County. Unfortunately, late in the redistricting process of 1970, Orange County was moved from the Fourth District to the Second District, but I ran for Congress anyway in a district that was approximately forty percent black.

It was a good year, because I had the good fortune, at that time, of meeting a young man who was a staff assistant in that campaign by the name of Toby Fitch. And we campaigned all across that District. Got to be good friends, got to know each other. And we lost the campaign to an incumbent by the name of L. H. Fountain. I've never, ever, said that I have won or lost a race, a campaign, because I was black. And that was not the case in 1972.

And I'm, personally, uncomfortable by the debate that we're having and the basis upon which we're having it. But I'm also a realist, and I'm also uncomfortable about the fact that our communities are still geographically divided by race in terms of where people live. And so, consequently, we have allowed people to develop doubts and to lose confidence in the system. And there are many reasons for that, and I want to iterate them here.

The Voting Rights Act, when it was passed, was necessary. And any time any law is passed into existence, there is always the possibility of not only using that for good, but also for using it for bad. It always exists. And we should know that.

I came back to this Body with my mind made up that I wanted to urge the leadership to go to court. Not that I can any way be opposed to minorities being elected to Congress, and if I did not favor it, I wouldn't have run

myself, but I didn't run as a minority—I ran as a person who was running for Congress. And I shall always do that in all my races as I have always done it in all my campaigns and I will do it in the future.

[20] I don't like the way we got here, but we're here. And we must not apologize for having to now do things that make us uncomfortable but let's do them.

In 1972, I heard the argument that when we moved Orange County out of the Durham-Raleigh-Wake County-Chapel Hill triangle, that it would destroy the cohesiveness of the community. Well, it didn't. We were uncomfortable. We didn't like it then like we don't like it now, but it didn'tl [sic]—it did not destroy the cohesiveness of the triangle area. It will make us uncomfortable, and we don't have to like it, as I don't like it, but it will not destroy the communities unless we, the leaders of the State, allow it to destroy the communities. It's like taking castor oil — who knows whether it does any good or not, but there comes a time when you have to pucker your mouth, Senator Simpson, and take it.

Blacks—I'm concerned that I don't subscribe to the separate-but-equal concept. Because I don't see these districts as being separate if we put them into effect. And I do see them as being equal. I see them as being a part of the twelve congressional district consideration representing the whole of the State of North Carolina, and we should not refer to them as being separate.

Senator Kincaid made the comment that well, if you develop these districts, blacks will run out and vote for blacks. Well, that begs the question, and I wish Senator Kincaid was in here — there he is — does that mean that you believe that whites will only vote for whites? I don't think that's the case. I really don't. I am not naive enough to stand here and represent to any of you that I'm not aware of the fact that there is still prejudice and discrimination and racism and bigotry existing in our

society. But we have symbols and examples all over this State where decent, good, and right-thinking people have come together and elected good, qualified, right-thinking, upstanding, successful, and effective people in public office.

I don't think this will destroy North Carolina. And if we go ahead and accept it with distastefulness and find the positive in it rather than looking at the negative, we can build on it to make our State stronger in the long run and not allow it to weaken us in the short run.

Someone else has presented a plan and raised the concept and the Justice Department could very well come back and ask us to do this, that we can now create a third minority district. Well, I live in the Fourth Congressional District, which is now made up of Orange, Wake, and Chatham County. And these Counties, including Durham County which is not now in the Fourth District, have a history of electing those most effective candidates who go out and represent themselves and who will get elected. Now, I don't expect my Congressman to retire any time soon. But, should he decide not to ever seek re-election, I can tick off five people, in my opinion, who could be elected in this District.

So, I hope that we will see the fact that in this new plan, the Fourth District in my opinion, has been made a much better District and in the long run offers an equal opportunity for another person who may be minority to run and get elected in this District.

The comment has been made that you almost got to be a millionaire to run in these districts. Well, you almost got to be a millionaire to run for Congress, period. Do you know how much money people have been spending to run for Congress in the existing districts? It ain't going to change anything!! And you know why it costs us so much money, it's because we want to use television, instead of using our feet and our legs and our

hands and getting out and meeting people. We take the easy way out as politicians. So let's not put it all on the fact that the district causes us to spend all this money. It's the way we campaign now. It is a long ways from Durham to Charlotte. But, I tell you, it's a whole lot easier to campaign from Durham to Charlotte on 85 than it was a campaign from Orange County to Northampton County in the Second District when the roads were all two-lane and we drove every one of them.

It was a whole lot easier to campaign from Durham to Charlotte than it is to campaign from Charlotte to Wilmington. So, I think we are kind of making special efforts, friends, to look for reasons to get out of this. And while I came back here with the determination and the attitude of let's fight, I think we owe it to the State and to the citizens to put forth what is [21] a little bit better plan — still distasteful — certainly one that holds out the possibilities that the masses of minorities out across the State can at least feel that they are having some input.

One final comment. In 1900, there was a fellow by the name of William B. Lee who was in the Senate of North Carolina. And Lee was a great debater, and if I believed in reincarnation I might have some thoughts of checking that out, Senator Daniel, to see if there's any relationship back there anywhere, but the same kind of argument that I'm making now, as I briefly read some of his comments he made; but the words I want to leave with you is that, yes, this is partisan politics. That's what politics is all about. Yes, you make decisions to protect yourself. That's what life is all about. And for those who say that the Democrats are trying to keep power — yes, because as Frederick Douglass, a former slave, once said, "power concedes nothing without a struggle." It never did and it never will.

And whoever is in power will do what they can to protect it. And those out, will do everything they can to

get it. That's the name of the game. I'm going to vote for the bill. Because I think based on what we have been told, and the fact that we're working against a Justice Department in my opinion that is not all interested in the people, but a Justice Department that rightly so is interested in the politics of it. But I'm going to vote for it and I urge my friends to join with me and let's get on with this.

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Senator Daughtry: Mr. President. Mr. President, I thank you for recognizing me, I will only take a minute to comment about the congressional plan. I have been involved in redistricting since the outset and have some idea about the—whether or not we can draw a district that is more compact than District Number Twelve.

I think Senator Lee was exactly right. This is a power play. That is the name of the game. It's whoever has the high cards can now play them and then we go home. But I also believe we have some responsibility to the people of this State, irrespective of politics to do better than District Twelve. The I-85 District. There is nothing about that district that makes any sense to the people of this State.

Certainly, it makes sense to us who are in here and power is the name of the game. But it doesn't make sense to the people. And another thing about the district, Dennis Winner is a good lawyer. He's also a good salesman, because he is selling this District Twelve to the people of this State on some idea that it is because we have District Twelve because of the Bush administration. That the Justice Department through some conspiracy has required us to have District Twelve.

That is not the case. Now, one thing I really resent about District Twelve is no one in this Building that I know about drew this plan. This plan did not come from

our staff. After long hours of looking, as Senator Odom said, someone said, well it can't be done, and here we have District Twelve. The rumor spread, and rumors abound in this Building, but as I understand it District Twelve was sent to us by the Congressmen who are in Washington. They have nothing to do with the Senate or the House, but they decided to draw a plan for us. I resent that. I think we can draw a plan in the southeastern part of this State that is more compact, that has more common sense, and certainly will please the people of this State more than District Twelve.

I agree with Senator Odom. It's not fair to Mecklenburg County. It's not fair to anybody who has to campaign in that kind of district. I have not heard one good comment about District [22] Twelve from anyone anywhere. I urge you to turn down this District. Let's draw a district to the southeast that will meet the criteria and go home. Thank you, very much.

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Senator Walker: What I would like to say is that I think we all look at this in taking blame because we all have blame. I go back to 1972 in a state-wide race in which I think it became a race between two men and racism came out. Jesse Helms won that race. He wasn't elected by just Democrats or just Republicans. He was elected by the people of the State and I think it was in the feeling that that's who they wanted. We have certainly gone through a number of re-elections and we came down in 1990 to another race, and a race I think that will go down in history. Because we had Harvey Gantt, a black, running against a white male, Jesse Helms.

And we came down to that race, a very close one, to show that perhaps North Carolina had changed. I certainly hoped that it had changed. Because I worked hard for Harvey, as all Democrats did, and yet one little

thing, I think, at the end came out and that was a TV commercial that had the crunching of the application or that notification and we got back to quotas again.

I hope that won't be an issue in the '92 race, Presidential or otherwise, for any of this 'cause I think we've come so close in North Carolina to being a State that could really say that any man, any woman could run and be elected regardless of race or sex.

So, I just want to say I support this bill because I think so far as the blacks are concerned that yes, they deserve two black districts. After going through a 1990 race, they can see we still need to make some improvements in how our relationships are between our people. So I say to you, let's see how this works.

I know a lot of folks have said they don't like this plan. It doesn't look good. I came back here after our called session in the end of December and thought well we need to take another look because they've said we need a second plan. Senator Winner was out in the Grand Canyon on a backpacking tour and I got with staff, worked, trying to come up with a second plan. Because I felt like we ought to go ahead and we made the commitment to two black districts. I [23] certainly hope that it will work out all right and that we can prove that we have done a good job and that we can support this bill.

I also remember the Lieutenant Governor, our President, who was talking about Randolph County in another era when there was a lot of changing back when he ran. He represented my County. But I think one thing was different then, we didn't have the one-man, one-vote rule and there were a lot of changes. Now, I think we do have the one-man, one-vote rule and until that's changed then I think we ought to abide by it and to try to come up with these districts as much the same. And also if they say under the Voting Rights Act that we

should be sure that the blacks have representation. And they certainly have almost a quarter of the population in this State, then we ought to have the two. And I support that. And I support these two districts. And hope that you will vote for them.

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Senator Richardson: And the only reason I do that — I hadn't planned to get up to say anything. The other black Senators had said basically what I wanted to say, but I just wanted to say one thing in answer to Fountain Odom; and to my good Republican friend.

Now I know 106 people, I don't know all 106 of them, probably, in Mecklenburg County. Fountain was saying that it was going to tear Mecklenburg all apart, but I can speak for 105,900 of them that they are happy to see this plan. And I had to say that because if I go back home they would wonder why I didn't answer to that.

We are still leaving 27,000-28,000 people, black people, for District Nine, and even 128 for District Eight. Senator Winner was saying — not Senator Winner, somebody was saying that we're going back to segregation. We still have in District Twelve, we have forty-five percent of the people in that District are white people. So, that is not a segregated district. It's just a district that the majority of the people in it are black. But it certainly isn't a segregated where everybody in the district are [sic] black. So I don't see where we're going back to segregation. But I can guarantee you out of this 106,467 black people in Mecklenburg, we are very happy to have a black representing us in Congress. Thank you, very much.

Lt. Governor: Senator Cochrane.

Senator Cochrane: Thank you, Mr. President. Like Senator Richardson, I had not planned on making comments on this either. I think having served on the

Committee, having spoken as often as I have, you are pretty aware of my feelings. But I think it's important, having listened to this debate today, to make a comment.

If there is an effort on the part of this Body to make this a black and white issue, you are going to fail. It is not! I'll tell you right now that I am one Republican voting against this map because it is gerrymandering of the most partisan order. I have no problem with blacks getting elected to anything and they do in my area to county commission, to mayor, to school board, to town board, to whatever. And this is not a racial issue, it is a partisan issue. And those of us who are Republicans that will choose today to vote against this map are voting on it for that reason.

Say what you will, let the reporters say what they will. I will tell my people and they will believe me because the letters I'm getting and the phone calls I'm getting are about the very kinds of partisan issues that we've tried to bring to the attention both in Committee and on this floor.

When I represent a county of little less than 29,000 people that ends up being in two congressional districts, and there is a feeling of total impotence at that point because they see little ability to influence either congressman. That's what these votes are about today. Historically, the government of this Nation was developed with the Senate which gave every state the sovereign right of two representatives. And a House of Representatives was created in an effort to give representation for the people. And it is that representation for the people that [24] we are talking about in this congressional plan today.

And I am here representing mine, as I am sure you are representing yours, and that's what this map is about and that's what this vote is about. And it is not a racial vote.

If you will recall, Republicans have been pushing for some of these other minority districts because I can only repeat again to you what I've said before. What we do to help other minorities helps us as a minority, also. Thank you.

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Senator Winner: Yes, there are places in here that there's point continuity. There's no law, incidentally, requiring congressional districts to be contiguous. But that, we certainly want them to be contiguous. And while I'm up here, about that point, because Senator Simpson raised the point about point contiguity, the — where, I can't tell you where they are, staff will have to tell you that because I'm not—have that kind of detailed knowledge about this plan. But they're in there and that's how it happens.

And if you did not have that, when you have something splitting through the middle of a county, you would end up with three districts in the county instead of two. And, for instance, the original I-85 plan did not come from Congress but came from Representative Balmer. And in his pla—this plan has the bad feature of having three—seven counties up in three districts, and I think that's terrible. Our first plan which we sent up there had no counties cut up in three districts.

Balmer's plan, because I don't think he had as much point contiguity in it—I think he had some, but Balmer's I-85 plan, which is fairly identi—close to this as far as that district goes, Balmer's plan had ten counties cut up into three districts and one county cut up into four districts. So, that is the reason for that. I can—I'm sure Mr. Cohen can show you where those points are. But there are places where districts come together at a point so they both cross over.

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SENATE COMMITTEE ON REDISTRICTING

January 24, 1992

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[7] DAUGHTRY: In your conversations with the Justice Department were you ever led to believe or were you ever told that in forming a minority district not to use the Indian population in the southeast.

COHEN: No, we were never told that we were to or not to, the Justice Department did ask us to examine the southeast as part of looking at this, in areas in Wilmington, Fayetteville, Chadburn, Whiteveille [sic]—that area. In the congressional district. We did examine the southeastern part of this plan and it did included [sic] part of the southeast.

DAUGHTRY: The question I asked was were you ever told or led to believe that not to use minority—in drawing a minority majority district.

COHEN: We were never told one way or the other whether Blacks or Indian, or whether Indians were to be used or were to not [8] be used. Our analysis of the election districts in that area was that what the court cases say is that you can only count minorities together for meeting this kind of goal—different minorities if they have cohesive voting behavior. The analysis of election statistics that we provided the Justice Department indicated that Blacks and Indians in the Robeson-Hoke-Scotland county area, and the data from Robeson is mostly the best because there are precincts that are nearly one hundred percent Native American — is that these groups do not have a cohesive voting pattern such that including them in a congressional district would satisfy the requirements of the Voting Rights Act. Now there were [sic] other testimony to the Justice Department contrary to that, indicating otherwise. The Justice

Department never really in their letter cam down in one side or the other on it. They mentioned that as a possibility for doing another congressional.

WINNER: Let me ask you a question about that.

COHEN: Yes.

WINNER: Isn't it true that the Twelfth District as it is in this plan has a larger Black percentages [sic]— population, registration and voting age population than the Black and the Lumbee Indians combined in Balmer's drawing in the District that they seemed to indicate might be okay.

COHEN: Yes, that's correct. This takes what is— this takes what was a [sic] open question of the Voting Rights Act under whether that satisfied it or not and replaces a district where there was no question under the Voting Rights Act.

DAUGHTRY: Let me—Can I finish? I have a couple of more questions.

WINNER: Yes, certainly go ahead.

DAUGHTRY: So, am I to understand that the Justice Department did not infer you or in any way indicate to you that you could not use Indians in drawing a minority district.

COHEN: They did not tell us whether it was acceptable or unacceptable in the letter; they suggested that we take a look at it.

DOUGHTY [sic]: Secondly, did they also tell you that when you are attempting to draw minority-majorities and draw any of these districts that they were as much interested in influence districts as they were drawing the minority-majority districts, especially in those areas where you could not draw viable districts by picking up people in each community. Did they ever talk to you about minority influence districts in those cases.

[9] COHEN: We had only minor discussion of that issue. The discussions, in fact, of that involved around the Fourth Congressional District where in the State's response both in its initial submission, later it extended on in great detail in the response to the ACLU comments and also in response to the additional information. That, in fact, the State's position that its enacted plan does have another minority influence district, and that's the Fourth Congressional District. The election statistics for Wake County, Orange, Chatham County indicates that Black candidates have an opportunity to elect a candidate in their choice for congress in the Fourth Congressional District. And, in all due deference to Johnston County in the earlier plan, in fact this strengthens that particular analysis by removing from that district precincts in Johnston County and adding some in Chatham and parts of precincts in northern Orange County. And I think that if we continue to be the State's position that there is another minority influence district in this plan, The Fourth Congressional District. Some of the alternate plans take Raleigh, the Black community in Raleigh out that district and would eliminate that as an influence district.

DAUGHTRY: One more question.

WINNER: Okay, are you going to be on influence districts again? On this question became I want to ask a question about that.

DAUGHTRY: Let me ask mine, first.

WINNER: Yes Sir.

DAUGHTRY: The I-85 district, in the House plan is a long, meandering district. It is not something that would be relatively easy to do to instead of drawing such an unwieldy district that has nothing in common with the people, that is it goes so far. It goes from the east all the way to the mountains nearly. Couldn't you have drawn instead of that minority influence districts, and isn't it

your opinion that the Justice Department would have accepted that, rather than this long district?

Cohen: I think it's an open—I think first of all this configuration here came from a plan that David Balmer submitted to the Justice Department in August. It came from a plan that was entitled Balmer Congressal [sic] 8.1. This district looks nearly identical to a district that he proposed to the Justice Department as an alternative in August. Ah, that's the first time that it appeared. It has some minor differences from that. I think the question of having it in common is an open question. I think you have a lot of people who would say that the Black communities in Raleigh, excuse me in Durham, Greensboro, High Point, Winston-Salem, [10] Charlotte, Gastonia have a lot more in common than —I think they said this on the House floor, than do the Black populations in Charlotte, in Lumberton, in Wilmington. I think that's an open question —I think there's arguments on both side[s] for that, but I would not say there's nothing in common between the urban Black community. In fact, the House plan takes a district that although it stretches that distance—it's very urban in nature and has much in common.

Some of the alternate plans, for instance, an alternate plan on the House floor yesterday had a so-called minority district that ran from Charlotte to Raleigh, that's thirty miles longer than this one from Charlotte to Durham that was proposed on the House floor yesterday. I think it is a whole series of open questions. I think that from the Justice Department's letter that the legislator [sic] has a lot of flexibility it [sic] how it chooses to do minority districts as long as it satisfies the requirements of the Voting Rights Act.

For instance in the Justice Department's letter there was an inference about "even the First Congressional District meandering [sic] that we find that it is not do [sic] for intentional racial discrimination." What that particular comment was about was why Raleigh was not in the First Congressional District. And the reason for that was the State's position was that having Raleigh in a, not in a minority congressional district enhanced the minorities' chances of electibility to congress by having that in the Fourth Congressional District, rather than having that in the First Congressional District, and leaving some other Black community, and you know I'm not criticizing the counties involved in that area, but having, having some of those Black comments [sic] in the eastern part of the state back in the —the Second or Third or Seventh Congressional District—and I'm not criticizing that area of the state. But that having it this way enhance[s] the minority chances of electibility, especially in the Fourth Congressional District.

DAUGHTRY: Last question. That what—the Fourth District, it says here has a total population of Blacks of twenty point thirteen percent.

COHEN: Yes.

DAUGHTRY: It's your opinion that that constituents [sic] a minority influence district.

COHEN: Because what—because the voting patterns of white persons in Orange, Chatham, and Wake counties indicate a far, far less amount of racial polarization than in many counties in other parts of the state. And, that is, and that is an extremely important consideration of the Voting Rights Act.

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[11] SENATOR RICHARDSON: I wanted to say to Senator Daughtry. You know I was leaning toward going down in Robeson County myself until I heard the public opinion up there. But the Indians themselves said who wants a minority district, but we sure don't want you to mess with Charlie Rose. That proves to me that they are saying that they wouldn't vote for a minority [12] district if you got to mess with Charlie Rose.

DAUGHTRY: Could I answer that, Mr. Chairman.

WINNER: Yes, even though you're getting out of order.

DAUGHTRY: But he addressed that—

WINNER: Yes sir.

SENATOR DAUGHTRY: To respond to that I was at the public hearing also and you talked to approximately two people, but there was not consensus about that and the question really is whether or not you can draw a minority district in the southeast, and obviously you can. The Justice Department said you could and it's compact and it's not like something going down I-85. Now whether they want to be in Charlie Rose's district. You're talking about something that's going to be ten years from now and if you stay with these incumbents. There are people who want to save Martin Lancaster, Tim Valentine's district. You can't let personalities get in the way of drawing these districts. You ought to draw them on the basis of what's best for the state and not what's best for Charlie Rose.

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[17] JOHNSON: No, more than Wake County—Wake, Harnett and Lee. But he was elected district-wide, not from a minority district. So if you look at the history of the voting in Wake County, you will easily see that the last twenty years that we have elected qualified Blacks, if you want to use that term or Blacks, you know without, a significant, without a significant racial minority.

COHEN: In Orange County, in Orange County the statistics all show a very minimal level of racially polarized voting, dating back many decades it makes up a significant part of the congressional districts, looking at election statistics for local, county officials, the state senate which includes Orange and Chatham is about half of that. Senator Lee's recent election; his electoral success before that; various races where Black people have run at various levels in Orange and Chatham and Wake Counties—all indicate to me and all the evidence has been supported is that Black candidates have an opportunity to elect a candidate of their choice for the Fourth Congressional District, from that district more so than from any of the others except the two minority districts in an equal or greater level than any other alternative plan that I have seen.

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HOUSE CONGRESSIONAL REDISTRICTING COMMITTEE

January 9, 1992

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Gerry Cohen (NC Legislative Staff): Well, the Justice Department rejected the Congressional Plan. I have the letter right in front of me, but on the basis that a second district where minorities were a majority could have been created, it was their feeling that the Voting Rights Act required that based on [2] North Carolina's population and demographics. They suggested looking at the district from Charlotte to Wilmington that was in Rep. Balmer's Plan as a possible district. They suggested that by combining blacks and Lumbee Indians that that would be a majority minority. . . . The Justice Department did say that the First Congressional District, as enacted by the Legislature, met the requirements in the Voting Rights Act and there was some language in there that said although it could have been more compact that it did not violate the Voting Rights Act for it not to be more compact . . . that there was no discriminatory purpose or intent and that as long as the Legislature has created a district that affects black voting majority that I would read it that it is up to legislative discretion as to where is the State to put within that district.

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Gerry Cohen: . . . the case law does talk about compactness because part of that has to do with whether there is an affective voting majority when there is any sort of community of interest.

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[3] I think the courts are just going to begin to see the effects of this computer revolution where you could draw a district from Murphy to Manteo that was ten feet wide and it might have a half-million people in it.

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HOUSE CONGRESSIONAL REDISTRICTING COMMITTEE

January 21, 1992

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[2] Rep. Flaherty: Thank you Mr. Chairman. What this plan is . . . is the result of sitting up there in the Public Hearing the other day and listening to some people speak. I believe there was a fellow by the name of Willie Lovett and another young lady from the NAACP that ask[ed] us to consider doing two minority or two majority-minority districts which I have done in the plan in addition to an influence district in the southeast. Now the majority-minority districts would be the Second and Twelfth in my plan and they have 53% minority-black voting registration and from what I remember that was what Ms. Winner indicated as being optimal. It really has a third district, District Seven, which is an influence district, but really has a majority percentage of minorities in that district, so it is basically almost a three-minority or majority-minority district plan. The only criteria that I gave to staff with respect to preparing this plan were that they do the two majority-minority districts and the influence district in the southeast. Other than that, I asked that the districts be as compact as possible . . . that they consist of Mitchell and Avery back in the Eleventh which is where, again, they have asked me to try and keep them. I was up there just Saturday and they reiterated that they would like to stay in the Eleventh. It keeps them together with Yancey County. A lot of the things in that area, for those of you who are not familiar, are things such as Mayland Technical College or Mayland Community College which is Mitchell, Avery and Yancey. The library up there is Avery, Mitchell and Yancey and so we did keep those together. I think it is a pretty good plan. We can, of course, get the deviation down further. Under the guidelines that Chairman Hunt had indicated it was not imperative that we be down to zero or one devia-

tion. Of course, we can get that down, but I hope that you'll look at it and receive it favorably.

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[7] Leslie Winner: To give a little of the background of the plan that was mailed to you; as Mr. Cohen said, the sample instructed to start with the plans that the NAACP presented at the Public Hearing and to try to both improve the black district and also to try to make some of the other districts more compact than they were in that plan. The primary change that was made from that plan was that there was some uneasiness expressed with putting Caswell and Person and Vance and Granville Counties into the Twelfth District which is otherwise a fairly urban district and it was thought that it would be better to have that district be more exclusively an urban district. So, those four northern tier counties were taken out of the Twelfth District and instead the black community of Winston-Salem was put into the Twelfth District and also Gastonia. That in turn left the Fifth and Tenth Districts short of population and thus changes needed to be made in those. I will also add that it is anticipated that we will present tomorrow some further changes in the Ninth and Tenth Districts to make those districts be a little less . . . a little more compact by making the Ninth District primarily the remainder of Mecklenburg, Gaston and Cleveland Counties, which is a nice compact little block that has about the right population and moving the Tenth District to the north so that it will pick up Lincoln and Iredell and that will make it be more compact as well. There were dozens of little changes that were made along the way and I will be happy to answer any questions that you have.

Chairman Fitch: Rep. Decker.

Rep. Decker: Ms. Winner, does that last comment mean that you will be taking out that little protrusion to

the west that goes into Buncombe, Henderson, Polk, Rutherford and McDowell Counties of the Tenth District?

Leslie Winner: I have not been instructed to do that.

Rep. Decker: What changes then? Can you be more specific or are you making it the Tenth?

Leslie Winner: That the Ninth District would be in the remainder of Mecklenburg that isn't in the black district, the remainder of Gaston that isn't in the black district, the remainder of Cleveland that isn't in the Eleventh District. [8] The Tenth District would then pick up Lincoln County . . . I think all of Lincoln County . . . all of Catawba County . . . I think all of Iredell County in the Twelfth District and all of Alexander County . . . I can't remember whether Alexander is in the Fifth, but it is either all of Alexander or all of Alexander that isn't in the Fifth.

Chairman Fitch: Rep. Flaherty.

Rep. Flaherty: Yes, Ms. Winner, I have heard a lot about a plan that a fellow by the name of Merritt with Charlie Rose's staff is supposed to have come up with. Have we seen that plan or is that the plan that you refer to as the ACLU or NAACP plan?

Ms. Winner: The plan that we started working with was the plan that Mary Peeler presented at the public hearing on behalf of the NAACP.

Rep. Flaherty: Is that the same plan that was known as the Merritt-Rose plan?

Ms. Winner: I don't know what was known as the Merritt-Rose plan.

Chairman Fitch: Rep. Wilson.

Rep. Wilson: I have a question concerning the drawing of the lines for the 5th District. I'm very concerned about that area because that did not really include an area where it was affected greatly by the minority dis-

tricts that were drawn. And what that has done is that has strung that district about two thirds of the state clear across the top — from Durham almost up into the mountains and over the mountains and up and over the mountains several times which would be almost impossible for the constituents to be served in any manner and in that area it would be. . . . Why wasn't it drawn when it is possible for compactness so that somebody can service those people? It's kinda like that what usually happens in something like that is the mountain counties kinda get left out and they are served by somebody that lives clear across the state and I just don't think it's right for those counties when we can draw something that is much more compact.

Chairman Fitch: The chairman was told—I guess I can answer your question this way—the chairman was told that we would be back into session on Wednesday, that the committee would meet today. We have come forth with a plan as a start. That plan is before you at this time.

Rep. Oldham: Mr. Chairman, after receiving the plan over the weekend, I met with a number of constituents in Forsyth County who expressed some concern about this plan. We feel [9] as though it unnecessarily weakens the Black influence in the selection of Congressional representatives. They feel as though it was a reconfiguration of the precincts and wards involved that we could get the job done and not unnecessarily weaken the influence. There are some suggestions. We have looked at some figures and we feel as though by including different parts of the 66th and 67th District that we can maximize the influence of the Blacks in that area. And we would suggest that . . . and I have those here . . . and I can talk with the folks later on but it is the same districts and whatnot; it's just a redrawing and a reconfiguring different ones and putting them into—some out of the Twelfth and putting them . . . and pulling some

and putting them in the Twelfth. And we don't feel it would hurt either of the two—well in fact, it would enhance our influence in the Fifth District but it would not hurt the Twelfth District at all.

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[10] Rep. Wilson: If you are taking suggestions, I would suggest that when you go back to trying to make those adjustments that you do look at. . . . I didn't get an answer on the 5th District but I am sure you are thinking on those things and if you would at least take that into consideration and try to make districts anywhere that you can that are compact so that the constituents in that district will be able to be served readily. I think that is very important when were are going to do something. I know that we cannot always do that when we have to draw those minority districts. After that's done when we do all the other districts I think it is extremely important that we try to do that and it obviously wasn't done in a lot of those areas. So I think we really need to go back and look at that and try to get those areas so that there are areas that can be served geographically and also in areas that are compact so that whoever represents them can at least do a half decent job in helping those people.

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[12] Rep. Green: Back in 1980, I wrote a letter to a good number of my friends that if we are not careful that the three branches of the Federal Government—Administrative, Legislative and the Judicial—will be in the hands of a non-democratic party. That almost came into fruition. We saw the courts system in this great nation put into the hands of the conservatives all the way down from the Supreme Court almost to the County courts. The same thing happened in the administrative unit and the only vestige of balance that this great state and country

of ours has is the fact that we have had some representation in Congress that has given us a voice. And so, we've not ask[ed] all these little questions. It's pretty obvious what we are trying to do. We are trying to balance our government. We are trying to give one part at least significant representation in one of those three tripods. We have lost the court system in the Judiciary as far as Democrats for the next 35 years. If we don't make some changes in the way we are going, we might lose Administrative for another 10 or 15 years. And so where are we going to be if we don't have some representation in Congress? So let's be fair and let's understand that we are working in this great country, we are citizens together and we want representation. We wouldn't have to worry about all these snakes if we just take the areas and see that we get representatives from all parts of the county. You know, (inaudible name) doesn't want to have to drive all the way down 85. He'd rather be in Durham, Vance County and Warren County if they would elect him. He tried that—2nd Congressional District—to Warren, then he was smacked down through the voting system. So what I am saying in principle [13] is it is clear what is happening and this is the last opportunity that we have to have some representation in this Democratic government that we have and so let's give and take. Give us a break.

Chairman Fitch: Rep. Decker.

Rep. Decker: Mr. Chairman, I would like to make a request since the staff is going to do some switching in the Tenth District, I would like to formally make this request to staff to take that portion of Forsyth County—you can do that for me only—and bring forth an amendment for me to take that portion of the 10th District that is in Forsyth County or you might say that backward—that portion of Forsyth County that has been put in the 10th District by the committee map that has been distributed to us and put that back in the 5th District and make an appropriate addition to the 10th District from that portion of the 5th District that is over just east of McDowell County and taking that little gooseneck out. Can staff have that ready for me by tomorrow? Can we get a comment on that?

Mr. Cohen: We could have an amendment to this plan to change those precincts in Forsyth—are you talking about like going down to Burke County?

Rep. Decker: There is a gooseneck that goes down through there and ends just east of McDowell County and is part of the 5th District. And just take that gooseneck out and have the western counties of Forsyth County back into the 5th District. I think it is very unfortunate to split Forsyth County three ways and I would like to not see that done to any county. I think this map has a finger of land in the 11th District stretching east nearly to Gaston County. I think that needs to be taken out because you've got a like finger of land in the 10th District stretching west into the 11th. Those really violate the sense of compactness and community and also that finger of the 5th District stretching down into the 10th. There seems no rhyme or reason when you['re] doing that that makes good common sense to the people of the State of North Carolina. As a matter of fact, this little map—I colored it the best I could—looks like zoo art like some animals at the zoo just threw some paint up against the wall and that is just where it landed. It doesn't have a whole lot of good common sense to it and I would like to see staff put Forsyth back whole and that is what I am asking.

Mr. Cohen: Also to take the 12th District out of Forsyth County as well or just the 10th? We will do whatever amendment you want. Earlier you said. . . .

Rep. Decker: The amendment I would like to see is the one I previously stated that you take that portion of the 10th District that lies within Forsyth County and put

that in the [14] 5th District. You understand? You following me? And you can take that section of the 5th District that stretches into the 10th down into the gooseneck—do you see the gooseneck?

Mr. Cohen: Mr. Decker, I understand. . . . The follow-up question where you said make Forsyth whole and the 12th District under this plan goes into Forsyth as well. I was asking whether you meant reduce it from three districts to two or to one.

Rep. Decker: Well, I'll stay as realistic as I can in the political arena. I think it pretty well. . . .

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[14] Rep. Warner: Mr. Chairman, I know that all (inaudible words). To be perfectly honest, I have not had any negative input from the folks back home on what has been given here. The only thing that concerns me is that generally the public reacts after we put something into the wheels of motion here and I certainly don't want to move so quickly when I look at [15] Robeson and Cumberland Counties and we appear to have a doughnut hole in that particular area that you have to hop over and then bounce in the same district line. I would like to see some serious consideration if at all possible. Gerry, if it's possible, coming in with the 8th District where that comes into the western part of Cumberland County connecting into the 17th House District which is where we would especially get minority voting strength. I know you might just jumble your numbers and percentages off but in that way it would leave a great majority of the Cumberland area at least in a better compact area, so to speak.

Mr. Cohen: So your suggestion was to take most of the voters of the 17th House District that is the minority. . . . Your request is that we take the 17th House District most of the voters of which are in the 1st

Congressional District in this plan and instead put in the 8th?

Rep. Warner: If that's possible and the reason for that is no other reason other than geographic. If we take the southwest part of Cumberland itself and we have a Congressman in that area and then stepping over we hit another Congressman and stepping over again we went back to the same Congressman we had before.

Mr. Cohen: Let me ask you one follow-up question so we can follow your instructions after the meeting. If we take that Black concentration out of the 1st District to replace that if you will get with us as to your preference of what area to put back into the 1st.

Rep. Warner: Let me make sure I clarify that. It makes no difference to me. I am not looking at minority or majority numbers at all. What I am looking for is the proximity that people can identify as to what Congressman is what area. It makes no difference to me. I certainly don't want it to be a racial thing at all.

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HOUSE CONGRESSIONAL REDISTRICTING COMMITTEE

January 22, 1992

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[4] Rep. Fitch: Mr. Justus, you talk about your plan does not have an I85 District. Then you compare and distinguish the difference between your I85 District and the proposed plan sent forth by the Chairman and your plan from Charlotte to Wake County . . . .

Rep. Justus: Yes, Sir.

Rep. Fitch: . . . . and talk about the rest stops along whatever road you have there whereby you would be able to accommodate the . . . . vote.

Rep. Justus: You'll notice the map. The district is first of all more compact. It's a wider district. Probably wouldn't be too many rest stops along that way. And, I think on balance again in meeting the criteria of the Committee that this is a much more compact plan, would still provide 2 minority districts. It is more orderly and this just has a variety, that it's better in my opinion, Chairman Fitch, than the plan, proposed plan, that the Committee is looking at.

Rep. Fitch: Mr. Chairman, I think I need to correct a statement made by Rep. Justus. I don't believe that compactness was one of the criteria adopted by this Committee. I don't believe that it was. But, a follow up question. In your district 6, you made the assumption that Rep. Balmer made in his plan from Charlotte to New Hanover that Indians and Blacks would make a minority district, it that correct?

[5] Rep. Justus: I used the Indians to make up a minority district. But, I would remind you that the Voting Rights Act refers to minorities not a minority. And, I don't think we can go into all minorities. I think the disabled are a minority. The women are a minority. You can't possibly include all of those different categories. So, since the Voting Rights Act refers to a minority or minorities, excuse me, I took that they meant by combining the minorities that would be sufficient.

Rep. Fitch: So, again you just hooked minorities to minorities in order to say that you now have a conglomerate minority district in order to say you have satisfied the Voting Rights Act?

Rep. Justus: I would say that is somewhat correct, yes.

Rep. Diamont: Mr. Chairman.

Rep. Hunt: Rep. Diamont.

Rep. Diamont: Mr. Chairman, a question for Rep. Justus, please on the plan. Yesterday we were told that the percent Black voter registration was one of the most important criteria. That under the original plan we sent to Justice that they sent back to us that it was 51.13% for the first district. And, yesterday's plan first District had 52.08% and the 12th District had 55.53%. What is the percent of Black voter registration for Districts 2 and 6 and does that fall in the area that the Justice Department will approve?

Rep. Justus: You remember yesterday that I asked some questions of Miss Winner in trying to determine what did fall into the parameters both in lower limits and both upper limits. And, you may remember that what we finally decided was, it depends. I think was the answer that I finally got. In talking about the figures in District 2 it is higher than 51.13% because there were computer errors as Mr. Cohen first (inaudible.) And, there were minorities that were not counted into that figure. So, the figuring is closer Bill, than 52% in actuality in minorities.

Bill Gilkeson: I would have to check that.

Rep. Justus: Would you, please.

Rep. Diamont: In District 6 . . . . the percent of Black voter registration in District 6 would be what?

Rep. Justus: It is 40.11% here plus the adjustment.

[6] Rep. Diamont: May I ask a question, please, Mr. Chairman, of Staff? Is there any legal case or decision that specifically said that you can or cannot put more than one minority together to equal [a] minority district? I'm sure there are other states such as Texas that have several different minorities or is there any kind of definite answer to the question?

Leslie Winner: There is a standard on lots of cases on that very question. The standard is in order to count two different racial minorities as minorities in establishing a district you must be able to demonstrate those two racial minorities both in a manner that is cohesive. And, what that means, you must be able to demonstrate that they both routinely support the same candidate.

Rep. Diamont: Can you prove that in North Carolina these minorities vote on a cohesive pattern and support the same candidate?

Winner: Our examination of the election returns for Robeson County which is really the only place that you have enough majority Native Americans precincts to figure it out is that they do not tend to vote for the same candidate.

Rep. Diamont: So, therefore the election results in North Carolina would not justify putting the two groups together.

Winner: I don't like to speak for the Chairman but, I think one of the reasons is the Chairman chose to use a second minority district that was not I85 instead of a minority district that ran across the southern edge of the state is because you don't have to rely on Blacks and Native Americans voting together to get a majority/minority district. On the I85 grouping you do have to rely on the southern route.

Rep. Justus: I might say in reference to that we seem to forget that the Native Americans were the original minority in this country. And, we never quite seem to include them in the things that we include others into.

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[6] Rep. Justus: I haven't, I haven't seen that the Indians don't vote, the Blacks. As a matter of fact in looking at the election figures that are established throughout this process, I haven't seen the Whites voting against the Blacks. There are areas that are overwhelmingly White in registration. Harvey Gantt got more than 60% sometime 70% of the vote. I don't think that is a factor we ought to consider. I think we ought to do what the Voting Rights Act called for and create a minority district with the opportunity for a minority to win. In my hometown of Hendersonville, we don't have but about 4% minority. Yet, we [7] elected a Black vice mayor and I think that is the way it should be. We have elected other people that are minorities. In areas where there are great majorities of one group of Caucasians, one group of Blacks or whatever happens to come along. Are there further questions?

Rep. Hunt: Representative Michaux.

Rep. Michaux: Representative Justus, you have mentioned the fact that the I85 corridor that anybody who was elected as a Congressman would be limited in terms of budget and what not for setting up offices. Two, two, two questions, well two things I want to put in your mind about that is I think we got two Senators who cover the entire State and they are limited in what they can do. But, I think they do a pretty good job of constituents' services is number one. Well at least one of them does. Then . . .

Rep. Justus: I agree with you . . . .

Rep. Michaux: Then the fact of the matter is any individual who runs in any is going to serve his constitu-

ency or their, wherever their office happens to be. They don't have an office in every little, in you know, in every town and hamlet. There are ways they can get to their constituency and serve them just as well as they could, fact of the matter is one office in a district wherever that district is or however it runs and still serve as your full constituency without that. I don't think that. I think what you were stating there is rather spurious rather than really you know looking at the situation. I don't think any Congressman is going to ignore any part (inaudible) what his budget may be or whatever. So, with two Senators covering the constituency in this State I think that argument falters a little bit.

Rep. Justus: There is one thing, may I answer this question?

Rep. Hunt: Go ahead.

Rep. Justus: There is one thing I think you failed to consider, Representative Michaux. A Senator has two to three times the money that a Congressman has. And, therefore can afford to cover those large areas. And, the second thing is it's a personal thing with me and I talked with some Congressmen who feel the same way. They kind of feel as I do that no constituency should be more than a 30 minute driving time from a Congressional Office. In this day of modern technology they ought to at least be able to get their problems taken care of.

Rep. Michaux: That raises a further question. Number one, the Senator has four to five more constituents to cover also. Rather than—but be that as it may. If a prudent Congressman, [8] a prudent Congressman can set up offices where his constituency will be available. If it is not set up in that manner that Congressman can do other things in order to bring that constituency, in order for him to get to his constituency. I mean, you know, Representative Justus, we want to meet, you know we want to meet the people and we make it available. We

make ourselves available as State Representatives, some of us, to meet the people. So, here again it's there is [sic] so many different ways that can be done.

Rep. Hunt: Rep. Redwine had a question.

Rep. Redwine: Yes, Rep. Justus . . . two points, really. You mentioned that you split forty-five counties; did you split any counties more than three ways or three ways?

Rep. Justus: Yes I did.

Rep. Redwine: How many was that?

Rep. Justus: I think that was eight counties.

Rep. Redwine: Eight counties split three ways; did you split any four ways?

Rep. Justus: No.

Rep. Redwine: None four ways . . . . question of the Chair, now. The original plan that we sent to Justice . . . . did we split, what did we do on the issue of splitting counties and precincts?

Rep. Hunt: We will refer that to staff; I don't believe we split any three ways.

Mr. Gerry Cohen: There were no counties split three ways; there were a total of fourteen precincts split. I don't have a count here of how many counties were split two ways.

Rep. Redwine: One last question . . . . Rep. Justus, yesterday we listened to a number of folks, mostly if I remember correctly — Republicans, speak to the issue of commonality of interests in a number of these districts. I'd like to ask you to address the issue in the minority district that begins in Charlotte and swings through the rural Piedmont southeastern or south central part of North Carolina that eventually winds up in the urban area of Wake County, it looks like to me . . . . the city of Raleigh or somewhere closeby. Explain to me what your

response would be as to the issue of communality [sic] of interest in that district excluding the urban area of Wake County on the other.

[9] Rep. Justus: Well, Rep. Redwine, you do have Fayetteville tucked in there, and it is an urban and not quite agrarian district, but it's in between there somewhere. Its an area of small towns as I drive through it and I expect about half of the people have would have agrarian interests and half would probably have an urban interest. And I don't much know how we're going to put it together without getting some diversion in that issue.

Rep. Redwine: Rep. Justus, if you remember I think the 2nd District that is planned in the proposal that we heard yesterday from the Committee Chairs, at least the two districts in my mind that were formed minority/majority districts that were proposed in that, did have some communality [sic] of interest because the I-85 corridor obviously took in much more, would be a much more urban flavoring district than what you have proposed here. It looks like as you said a lot of it is very agrarian, very rural, and I am familiar with that part of the State. You are in fact correct. The other minority/majority district in the other proposed plan, the 1st District, obviously is a pretty rural area and would have, I would think, a fairly good communality [sic] of interest, but I can't see how you can tie this district, the 2nd proposed district here, and make it fit in any on the issue of communality [sic] of interest — at least in my mind — knowing the geography and the people in that area.

Rep. Justus: Certainly you would know that geography of people better than I and I would say to you there, if we think its better, it may be proven that it isn't. And we are sort of at an impasse. I'm going to stick to what I've said and I am certain that you have a credible argument and we will look into it.

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CONGRESSIONAL REDISTRICTING
HOUSE FLOOR DEBATES

January 23, 1992

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[3] Rep. Fitch: Thank you Mr. Speaker. House Bill 3 Committee Substitute. The Chairman Ed Bowen, Sam Hunt and myself presented to the committee Base 9 Bill to be considered. That Bill was substantially what you received through the Bill last week. The Bill now carries the number Congressional Base 10. As you know the Federal Government rejected the plan which this body ratified in July saying that we could have and should have created a second majority minority congressional district. The purpose of this proposal is to meet the requirements of the federal government by enacting a redistricting plan that has two majority minority districts in population. The plan we presented is similar in most regards to the plan which was mailed to you over the weekend. Let me however, review for you, some of the important features.

First of all we feel that this plan meets the one man, one vote requirement, a perfect population equality. Each district has a population deviation of either one person or zero people thus the state will not be subject to court challenge on this particular basis. Secondly the plan goes beyond what we considered to be the requirements of the Voting Rights Act by creating two minority districts. District 1 is 57.26 percent black in population and 53.4 percent black in voter age population. District 12 is 56.63 percent black in population and 53.34 percent black in voter age population. Harvey Gantt won each of these districts by a substantial majority. In your packs you have the actual accurate voter registration percentages found on the first page within the bottom of the second paragraph within your data package which also includes your maps. We believe that these districts give black citizens of this state a realistic opportunity to elect

Congressmen or Congresspersons of their choosing. Although these majority black districts are spread out they have a commonalty of characteristics. District 1 in the Eastern part of North Carolina is largely rural in character. Only 18 percent of its population lives in cities of 20,000 or more. In contrast District 12 which runs from Gastonia through Charlotte to Winston-Salem to Greensboro and to Durham is urban in character. Eighty percent of its population lives in cities of 20,000 or more. In addition to the two majority black districts, there are four more districts, districts number 2, 3, 4 and 8 that have a population percentage of over 20 in black population. This will give black citizens of these districts a substantial opportunity to influence the Congressperson elected from those districts. We believe that our approach is superior to the one suggested by the Federal Government. The Justice Department suggested a second district running form Charlotte to Wilmington. Such a district does not have the commonalty of characteristics providing people of Charlotte and Wilmington in [4] their urban needs with people of Anson and Bladen counties which are rural and have rural needs. In addition such a district would provide minority representation only if black and native American voters voted together and the voting record does not establish that they have or will do just that. Thus we expect that our plan will work better for black[s] than would the approach suggested by the Bush Administration.

I will not go over in detail the composition of each District. Your statistical package contains a map of each. I will point to you the maps of District 9 and 10 which have been modified substantially since you received the plan over the weekend. We have made each more compact in response to the concerns that were raised by many of you. In addition we have concerns that were raised by many of you. In addition we have returned all of Congressman Ballenger's home county to the 10th District. We also made changes to the 2nd and

4th Districts which enabled us to make Franklin, Johnston and Chatham counties whole. I have heard many concerns about the number of counties that are divided in this plan and I would like to respond to those concerns. This body enacted a Congressional Redistricting Plan in July which divided no county into more than two parts. The Justice Department through its rejection did not want that type of a plan. Representative Balmer has introduced four congressional redistricting bills. Each of those divide a substantial number of counties into three district[s]. Indeed one of his plans divided ten counties into three districts and one into four districts. Representative Justus presented a plan to the committee and Representative Flaherty presented a plan to the committee which also divided many counties into three districts. The plan we propose keeps 57 counties whole, divides 36 into two districts and divides 9 counties into three. Those of you who object to our division of these counties should have been urging the Bush administration to accept the body's congressional redistricting plan as it was originally enacted.

Finally, we think that this plan is fair on a partisan basis. We believe that it creates four districts including two majority black districts that are likely to elect Democrats, Districts 1, 4, 7 and 12; three that are likely to elect Republicans, Districts 6, 9 and 10 and five that could go either way. We have tried to meet the dictates of the Justice Department, the needs of the minority community of this state and the concerns raised by many of you that we have heard as we have moved throughout the process. The plan that is before you now, Base 10, as I indicated, is not the same plan and is not the identical plan that came to you this morning. There is an engrossed bill that was an amendment offered by Representative Jones, other than that the plan is as you saw it this morning. We would urge your support for the plan. Thank you.

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[5] Rep. Flaherty: Thank you Mr. Speaker. The first thing I would like to point [out] is that I don't agree with and I know that the courts have interpreted it this way, but I don't agree with the court's interpretation of the one man, one vote rule. I think it's a little bit ridiculous when you take into consideration that people are born and die every day that the ideal population for the Congressmen in this state are going to be different from the ideal population for Congressmen in other states that you have to cut up political, governmental bodies to get to that point. However, my plan does not do that at this time. It could, however, staff has not had a chance to bring it down to 0 or 1 variation. They have assured me they could do that if given the time but I would still ask that consideration of this plan be given. It does do something that the plan that the Committee Chairmen have submitted does not and that is it addresses the Southeast region of the state which was specifically pointed out in the Justice Department's letter. This plan would have two majority minority districts. It would have a much more compact majority minority district than the Northeast which in my plan would be District 2 and would have black voter registration of 53.15 percent. In District 12 which is basically the I-85 district there would be basically 53.70 percent black voter registration in the numbers figured by staff to take into consideration the problems they had with various counties. Now it indicates on here that District 12 is 53.49 but I do have a memo from Gerry Cohen which says it is realistically more like 53.70. In the District 7 which would be an influence district it would have more accurately 43 percent black voter registration and about 10 percent native Americans.

The way that I came up with this plan, Mr. Speaker and ladies and gentlemen of the House, I was sitting up there in the public hearing and I heard at least two speakers indicate that we should look at a district in the Northeast, consider the I-85 district and also make an

influence district in the Southeast [6] with at least 35 percent black voter registration and 8 percent American Indian registration. This plan when I asked staff to go ahead and try to draw this up they came up with it and its got over 50 percent in the influence district which would actually make it possible to elect three minority members of the United States Congress from this state. There is no other plan that I have seen that could realistically do that and I would ask you to seriously consider this plan. It does not submerge blacks, it does not separate blacks, it tries to fragment blacks, it tries to treat all the black[s] across the state the same and it would give the Native American population in District 7 an actual swing vote. Now all three of three districts as Representative Fitch said with respect to his plan or the Chairman's plan were carried substantially by Harvey Gantt. So I don't think there'd be any problem in electing a black Congressman to these three districts. The only other criteria that I asked staff to consider was to put Mitchell in Avery County in the far west together with Yancey County. I was up there as recently as Saturday and they all assured me that they wanted to stay in the far west, that they all wanted to stay together with Yancey. Any of you that may be familiar with that area knows that there are several things that those three counties are working in cooperation with; the library, the AMY up there which stands for Avery, Mitchell and Yancey. There is the community college up there, Maylon Community Technical College which is Mitchell, Avery, Yancey. It does not split those three counties so basically what I did was I asked for basically two districts that were in the NAACP plan or the Charlie Rose or the second merit [sic] plan or whatever you want to call it and do exactly what we were asked to do at the public hearing and also address the issues that were given to me by the people back home.

With respect to partisanship I didn't ask that any Republican districts be made, that any Democrat districts

be made or as you do in the Chairman's plan, that you go into the heart of Caldwell County and take a county which has all precincts that the registration is majority Democrat, you go into Caldwell County and take those precincts out that vote more Democrat than the other precincts to try and protect what I believe is trying to protect an incumbent Congressman from Winston-Salem. I didn't ask for any of that. Now several people have told me well how many Republican Congressmen would this bill elect? I don't know. I would hope we would be competitive in all districts. At some point I hope we would be competitive in all 12. However, if you look at the registration, the registration Democrat to Republican is over 50 percent Democrat in every district but one and in that one district the registration is 49.62 Democrat to 42.59 Republican so that should still be a Democrat district assuming that an individual ran that his party would not desert. But in any case I've also been told tat some people consider this an all minority plan, I don't know. It would elect blacks and Republicans but, Mr. Speaker, I tried to address the questions raised at the public hearing. There is no hidden agenda for this bill, I just did what I thought was doing a good thing in asking them to be as [7] compact as possible, asking them not to care about incumbents, and just make as nice a plan, as clean a plan, and get the two majority minority districts and an influence district in the Southeast. This would affect almost every county that is subject to the Voting Rights Act. It would affect every county that is subject to the Gingles case. I would hope you would give this map serious consideration because I think it does do more along what the Justice Department could in black and white look at the Southeast then what the Chairman's plan does. I will be glad to yield to any questions. I move for adoption of the amendment.

Speaker Blue: The gentlemen [sic] moves for adoption of the amendment. For what purpose does the gentlemen [sic] from Wilson, Representative Fitch arise?

Rep. Fitch: To as[k] the gentleman a question.

Rep. Flaherty: I yield.

Speaker Blue: He yields.

Rep. Fitch: Representative Flaherty, during committee debate did you not indicate that you had one criteria that you gave to staff and that was to keep your community whole?

Rep. Flaherty: I did. I said since I was running it that I hope they could keep Caldwell County whole. I did say that Sir. Yes, sir. Since I was running the bill, yes sir.

Rep. Fitch: Another question.

Speaker Blue: Does the gentleman yield?

Rep. Flaherty: I yield.

Speaker Blue: He yields.

Rep. Fitch: You were willing to split other people but you didn't want to be split yourself?

Rep. Flaherty: Well, no sir. But since I was running the bill I didn't think it was wise to split my county, didn't know that it would be necessary to split my county, if it was, if that has to be done, that have [sic] to be done. It may have to be done to get it down to 0 to 1 variation and if that's the case, then so be it. But I would also suggest that I would be open to suggestions with respect to changing the minority districts or changing any other districts. I would like if I had more time to try and get more counties whole in this plan because I think that's more appropriate than splitting the counties the way that we've done it. But this is the best it could be done in the time allotted.

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[8] Rep. Balmer: Thank you Mr. Speaker. I had resigned myself not to talk tonight because I was under the impression that we might be able to go home tonight but now that the Senate has gone home we will have to be

here tomorrow. Representative Fitch had a chance to poke fun at my four congressional plans and I can't resist the opportunity to discuss the congressional plan that he is bringing forth out of his committee. We stood here in July and I asserted that the plan that was being passed at the time would not pass the scrutiny of the U. S. Justice Department. I was at that time reasonably confident that the Justice Department would overturn it. To be honest with you, I wasn't sure. But I am sure that they're going to overturn this plan. Let me tell you why. First of all it does not create—you know, the part of the Justice Department opinion on Congressional Redistricting is very brief. It even boiled all down to one sentence in that letter. It said to create a minority congressional district in the Southcentral and Southeastern part of the state and this plan does not do that. It creates a minority district in another part of the state and the Justice Department may write back and say we appreciate you identifying a third congressional district that needs to be created but still go back and create the district that we said you need to create in the Southeastern and Southcentral part of the state. That's the first reason.

The second reason is just look at this map. That's probably the best reason. Just look at it. A lot of people when I first suggested the Charlotte to Wilmington district said to me, "You've got to be crazy. Look at that Charlotte to Wilmington district, look how spread out it is." And I thought I was going crazy too. But now, that Charlotte to Wilmington district looks like a very compact, well organized district compared to some of the other districts that are on this map before us. Another thing about this map that I cannot in good conscience not say and I say this in sincerity and from the heart but I really believe and from what I have been reading in the newspapers and from what I have been hearing this map was [9] not even drawn by the Democrat leadership in this legislature. It was drawn by Democratic Con-

gressmen in Washington. This legislature if that is true, has shirked the responsibility that the Constitution gives and that is for each state to divide its Congressmen however it wants too [sic]. So the Legislation [sic] should make these decisions, not the Democratic Congressmen. Now of course, nobody is ever going to able to proved [sic] who drew the map but if you look at the map it seems to prove that. Look at the 1st District. First of all all the 1st District is too spread out. You can create a minority district in eastern North Carolina that is very compact. That's the one area of the state where you can make a compact minority district and it wasn't done. Why wasn't it done? Well, lets look at Wayne County, 37,044 blacks are in 4 precincts in a compact area in Wayne County. This legislation in it's wisdom and in compliance with the Justice Department opinion made State House and State Senate districts in Wayne, Sampson and Duplin counties. This legislature last week said this has got be done to comply with Justice Department opinion. In other words, this legislature said that the minorities in those counties need to be represented. Now how can we say as a Legislature that they need to be represented in the State House and need to be represented in the State Senate but they do not need to [be] represented in the Congressional maps. That's contradictory. Why was Sampson County and Wayne County kept whole? The name of one individual is the reason why, Martin Lancaster. The legislature, what about the 4th District? 38,000 blacks live in South Raleigh. What is unusual about the minority population in Wake County that is so different from minority populations in other areas of the state that have been put into the minority districts. The minority populations in Wake County are very accessible to either one of the two minority districts in this plan. They could have been put into either one of the minority districts. Why were they not? It's because Democrat Congressmen in Washington drew this map. David Price drew the 4th District. What about the

7th district. The 7th District is in the area of the state where the Justice Department said you need to create a second minority district. Almost all of Robeson County remains in the 7th District. Robeson County is 63 percent minority but it was not put into either Congressional district. Why was it not put in? The names of two individual Democrat Congressmen need to be mentioned now, Charlie Rose and Bill Hefner. There's were [sic] Robeson County is right now, instead of being put into either one of the minority districts, under this plan you would have to put it into the Eastern District, the plan that I introduced from Charlotte to Wilmington gave the blacks and Indians in the Southeastern part of the state representation in Congress. Under this plan the Democrat Congressmen in Washington have drawn the seats to protect themselves. What about the 8th District? It comes all the way to Cumberland County, comes into Charlie Rose's own home county to remove a number of Democratic precincts and moves them into the 8th District to protect Bill Hefner.

[10] But finally, well not finally, the 5th District, we're going to have a lot of names for that one eventually, but anyway the 5th District clearly is drawn to protect Democrat Steve Neale. I can't imagine anybody else besides maybe David Diamont who would have wanted to have it drawn that way. But I'm poking fun at David Diamont cause I don't think he wants to run for it. What about the 11th District? The 11th District was clearly drawn to eliminate Republican Congressman Charlie Taylor. All of ya'll are saying, "All this is nothing new, it's been going on hundreds of years". I know that but I think this map not only is going to be rejected by the Justice Department but I think this map right here is going to become the test case in the Federal Courts from the issue of partisan gerrymandering. And I think the Legislature is going down the wrong road if we want to become the case in the Federal Courts of an

example of partisan gerrymandering. And I respectfully request that you vote against the plan. Thank you very much.

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Rep. McLaughlin: Thank you Mr. Speaker. Ladies and Gentleman, I have been thinking about this quite a while and a real case of political reality is what we have here in this bill. I think anybody that knows anything about what we're doing here recognizes that. The Justice Department has forced the General Assembly to produce two minority Congressional districts. I think we all understand that. If you will argue I think that this wasn't a political move, I think everybody knows this was motivated by politics and politics alone. I thought and I still think it should be tested in the courts but somehow higher level has been decided we're not going to test it in the courts and I have nothing more to say about that. Now let us understand that each of these political moves on the political chessboard requires acccountment [sic]. It [sic] time to about move when the Justice Department made their move then it's the position of the General Assembly to make their political move and we have done that with this bill. This is a political bill. I don't think anybody with any judgment at all would question that. Anyone can look at the map of this thing and know there is something wrong with it. I mean, you know it don't [sic] take a whole lot of intelligence to look at the map we've got here and know that thing don't [sic] make any sense. It's just common sense it don't [sic]. I have to claim I don't have a whole lot of education, all I can go on is common sense and I've got enough common sense to know that map don't [sic] look like anything. I think all of us understand that. I don't think that you can look anywhere in the country and find such a [11] disgraceful looking map in any Congressional setup in the country and I believe that's a fair statement. On the other hand you wonder well why in

the world we support such a map. Well you know, as I've said it['s] politics, it's nothing but politics and I think we have to accept that. I've had to find some way that I might be able to support it. I'm on the Congressional Committee and I felt like that somewhere along the way we've got to come up with some kind of compromise that we could go with and I agreed to go with it and I did it with all these things in mind knowing full well that I can't explain that map to anybody in my home town. I can't explain why Mecklenburg County, I can explain it but they're not going to be satisfied, why Mecklenburg County is going to be in three districts. But yet, it's a political reality and I'm willing to accept that.

And then I started trying to find some plus sides to it. Again on the minus side I'd have to say that Mecklenburg County and we all know about it twenty years ago was forced through the courts to integrate our schools. My people in my community and my family committed to integration. We put our hearts in it and we worked for it, not always because we were happy with it but because we thought it was the law of the land, and we still think it is the law of the law [sic] and we're still committed to it, it's an ongoing thing. You have to stay committed to it if it's going to amount to anything. We committed ourselves, our money and our children to that, and yet plan flies right in the face of it and I defy anybody to prove to me that it don't. This plan flies in the face of integration and integration of school systems that we [have] gone and spend [sic] so much in Mecklenburg County to commit to, this plan flies in the face of it. Now you say, well how in the world can you deal with such a thing and I've had a hard time dealing with it. I've actually lost sleep over it. I worried and concerned myself and was really ashamed of the plan we passed last summer because of such an ugly map. I voted for it but I was ashamed of the vote and still am. But again, I've had to vote for other things that I didn't really feel good about it and I still tried to find some way

that I could support it. And I have come up with a way. It may not suit anybody else but it's going to suit me. First, you have to decide if you're going to accept the premise that we have to have two minority congressional districts. Well, it seems from all I've seen and all that's happened here that this General Assembly has accepted that, whether I like it or not, whether it's factual or not, whether the courts will uphold it or not, the General Assembly has accepted it. That's another political reality.

So with that in mind, the present plan does make two districts, two minority districts that I think is as good as any I have seen. I've seen a good many of them, a lot of them have been awkward, some of them have one district that looked reasonably well, but the other one would be awful. So I think this is about as good as you can do with that and I think that's all right and I can live with those two districts. I think the 12th District at present looks better than the 1st District. I'm sorry that we have to put this crazy kind of thing on the public, again I don't have a lot of choice. I think we're going [12] to have to go with it or not and I don't see any possibility that we're going to go to court with it so I think we may have to go with it. But the fact of the matter is, it's all politics. And anybody knows it is. I've seen the trains on the track and I've been around here long enough to know that you either get on the train or get left at the station, so I'm going to get on the train. But I'm not a bit excited about it, and you know one of the reasons that I think I can get on board and again it's political reality, that this whole political process is that Mecklenburg County will now have the opportunity to have two Congressmen. We're going to have the opportunity to have two Congressmen from the County of Mecklenburg who actually lives [sic] there, a real good opportunity. So I think that might kinda turn me around and I can go home and maybe sell that and say you know it's a crazy thing but we can get two congressmen out of

[it]. Maybe it's all right, maybe we can live with it. But folks, again that's political reality. In politics you have to take a lot of things you don't want, so with all that in mind and another thing I'd like to mention to you is my home precinct that was sent out last weekend has now been split in two districts. This bill we got today, tonight, my home precinct is split in two districts. It wasn't that way last weekend. So you see things do go around and they come around. Folks, that's politics and if you don't like it you're in the wrong game because this is a political game. But anyway I have committed to this plan. I don't like it. Folks this plan stinks but I'm going to hold my nose and vote for it. Thank you.

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[14] Rep. Jeralds: Thank you Mr. Speaker, Ladies and Gentleman. When we look at this bill and in line I guess somewhat with what Representative McLaughlin stated, I'm reminded of a great African American Frederick Douglas that said sometime ago that power concedes nothing. And I think it was also said that we may not get everything we fight for but we're going to have to fight for everything we get. And it just seems strange that the members of the minority party in this matter would expect that the majority members would create additional seats so that they might gain additional power in this particular exercise. What's even more frightening is when we hear some subtle suggestions that they would appear to expect some help from the Justice Department or from the Federal Courts to assist them in this effort to gain additional power. We have seen instances in other parts of the country where the Justice Department and the Federal Courts have made a complete mockery out of the redistricting process. I'm reminded of just last week in Texas where the General Assembly passed a Senate plan that appeared to be pre-cleared by Justice only to have the three court Republican panel institute their own plan that would be more in favor of the

Republican party and when it was questioned as to some irregularities that took place, that being that Republican members helped to draw the plan and was seen even in the Federal Judges' offices helping with the plan and questioned, immediately the Federal Judges sealed the documents so that no one could even see what went into the plan. So I think that we have reason to be concerned when we see appointed officials, particularly when it is the Justice Department and members of the Federal benches that seem to be wanting to intercede to help other minority parties gain some kind of advantage in this process. It appears we have heard two or three times, we just heard Representative Balmer almost say unequivocally that we would expect to have the plan returned. We have heard other instances where it seems as if members of the minority party have some kind of inside door as to what's going to happen when we send a plan up.

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[15] Speaker Blue: He yields.

Rep. Creech: Isn't it the responsibility of and obligation of the Federal Courts and the Federal Judges to uphold the Federal law of this land — being the Voting Rights Act?

Rep. Jeralds: It certainly is.

Rep. Creech: Thank you.

Rep. Jeralds: There again it should be up to the Federal Courts to uphold the land [sic] but it's up to the elected body which is the General Assembly to draw plans that meet those laws. And I think it has been said on a number of occasions when we had previous Supreme Courts and in this particular case it was appealed to the Supreme Court in Texas and they refused to intervene. We have seen instances where we're told that, in a number of instances, courts were intended to interpret the law not write the law. And if that is the

case we should not have to put up with that as far as redistricting is concerned. I think that in the whole scenario that we are seeing in redistricting the minority party could in some ways take some kind of lesson from what African Americans have suffered as minorities being any such thing as an even playing field. And there isn't anything magic about time. The minority party has been around for over a hundred years and they still haven't gained any parity just as we as African American have been over here fighting for certain rights for a hundred years and you tell us that we should have gained parity by now. So it isn't' anything magic about time. And I think that probably if you stay here for another fifty or sixty years probably the Republican party will still be a minority party. There isn't anything magic about having a few individuals that exceed such as Colin Powell or Secretary of Human Resources, Louis Sullivan, that means that the masses have gained any kind of statue [sic] just as you have the Governor and Lieutenant Governor and you still are the minority and haven't gained any statue [sic] in this fighting. So there isn't any such thing as an even playing field and it doesn't mean you're going to gain just because there's a matter of time. I think that we have to realize that as Representative McLaughlin stated this is a political process, power concedes nothing. It will appear that what the minority party is looking for is an affirmative action plan that they could put forward in order to gain some kind of parity in this redistricting process. And last of all it would appear that they expect us as the majority party to create some quotas. What they're looking for is a quota bill that would allow them to gain some additional seats just based on the fact that they're here. So I think that we need to approve this plan. If the Justice Department or if the Courts want to intervene as it appears that they are ready to do in order to promote the Republican causes, then so be it. But we should do our responsibility and approve the plan and send it forward.

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[28] Rep. Green: Mr. Speaker and ladies and gentlemen of the House, uh, I'd like to say that this amendment does two things in principle. First of all it takes a small group of, a small strip of voting territory down in the 2nd District in Warren County and Halifax County and it takes a group of Native Americans and remove[s] them into the 1st District from the 2nd District. This small group of Native Americans that are in Warren County that I represent and then in Halifax County that's represented by Representative Hardaway. The other thing that the bill does is that it takes, uh, 4 precincts, Fountain, Faulkland, Farmville west and Farmville east in the 1st District subject, uh, as a result of the amendment this morning by the Committee and puts them back into the 2nd District. And I would like to ask a couple of questions, if I may, to Representative Jones, Mr. Speaker, please?

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[29] Rep. Green: Do you not realize that, uh, first of all, publicly Congressman Jones has announced that he's going to retire, and that being the case does it not sound logical that leaving these precincts in the 2nd District would remove from the 1st District that image of a congressman that's been there for a long time that would decrease the chances of a minority getting elected?

Rep. Jones: Representative Green, I have great faith in the black voters in the 1st District, their intelligence and their intelligence to look at candidates, both white and black, and decide which candidate they want to vote and support. So I think that what we've done with the amendment today, if I may, that I offered that was voted on, uh, 18 to 9, passed the Redistricting Committee, chaired by Mr. Hunt, Bowen and Fitch.

[30] Basically what I was trying to do was to put back black citizens and white citizens in my home-town and

(inaudible) asked that we try to get Farmville, Faulkland, and Fountain back into the Pitt County area and also back into the 1st District. Very quickly, again, I have faith in the ability and the intelligence of the black voters. I think they should have every option to vote for a candidate, where [sic] it be black or white.

Rep. Green: Uh, Mr. Speaker, one more question, please.

Speaker Blue: Does the gentleman yield for another question?

Rep. Jones: Yes sir.

Rep. Green: Let's say, uh, since the deliberations in our committees and on this floor are open, are for public record, did you not support, as a Democrat, this morning, the amendments submitted by your distinguished Republican colleagues in the Committee?

Rep. Jones: Yes sir, I did in Committee vote for Mr. Justus' plan. I think that that plan is one that should have an . . be thoroughly considered, the plan did lose and I don't mind saying to the members on the floor, I have all my career, this is my last session here, I have tried to vote my conscience, many people might question that, I tried to do what's right for the right reason and therefore I believe that the best interests of the people of North Carolina would be served. I did support this plan that we now have before us once it, once my amendment was put into it because my biggest concern about the plan that had been offered was the fact that the NAACP Plan and also the plan that passed the House back in July had Farmville, Fountain and Faulkland in the 1st District. My concern with what I received last Saturday was that those 3 precincts, for whatever reason, were taken out. So once I got those three precincts back into it, I could support this plan.

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[37] Rep. Flaherty: The other thing that concerns me is when you look at the districts and I touched on this somewhat when I talked about Caldwell County and the way that it appeared to me that the plan was drawn up very much in a partisan way, especially in the west. If you look at some of the counties, for example. In Cleveland County, uh, the majority, there's 42,000 people in District 9, Representative McMillan's district. There's 42,000 in District 11, the one that's presently held by Representative Taylor. However, if you look at the minority, the minorities are two to one in Representative Taylor's district and that county, as I remember, was not split that way[.] Previously, it was all in one district. If you'll look at Caldwell County, for example, in District 10, we've only got 545 blacks left in Caldwell County in District 10. There's 3,336 of them that have now been put into Representative Neal's district. And I've been very fortunate. I've enjoyed the support of the black population in Caldwell County and I don't think they would like to be fragmented like that. I've not heard it. In Burke County, for example, you've left 521 blacks in Representative Ballenger's district. There are 4,657 now put into Representative Neal's district. In Buncombe County, uh, there are 300 well, 302 blacks that are put into Representative Ballenger's district and the majority, 14,034 are left in the far west. Uh, I would just ask you to realize that, you know, we're being told that we're doing all of this because of what the Justice Department says. But the one thing they said was look at the southeast and we've not done that and I'd ask you to consider that when you vote on this plan.

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[38] Rep. Pope: Representative Ramsey, on the debate on the House bill you spoke quite forcefully and effectively about unnecessary dividing of counties. On the plan we have before us as has been pointed out, the old 11th District has been divided several times. The Buncombe, Henderson, Polk County areas. That does

not involve Voting Rights Act counties, does not directly involve any of the minority districts created under [the] Voting Rights Act. Do you support this division of the counties?

Rep. Ramsey: I supported this bill before, I'm talking about the Congressional Redistricting bill that has passed its second reading and is now on its third reading. Yes, I support it because that's the only bill we have and we are sent here to do a job. One of those jobs is to come forth and pass a Congressional Redistricting bill, that's the only one we have. Yes, I support it.

Rep. Pope: Mr. Speaker.

Speaker Blue: The gentleman from Wake, Representative Pope has the floor.

Rep. Pope: Ask Representative Fitch will yield for a question.

Speaker Blue: The gentleman from Wilson, Representative Fitch, yield for a question?

Rep. Fitch: I yield.

Speaker Blue: He yields.

Rep. Pope: Representative Fitch, in your opening remarks, and that was some time ago now, you referred that this was done . . . this plan was prepared to meet the requirements of the Voting Rights Act and Justice Department. Is there any part of the Voting Rights Act that you know of that requires for a finger of District 10 to go into House District 11 and divide those counties. Polk, Henderson, Buncombe County in that area.

Rep. Fitch: Your question is whether or not the Voting Rights Act requires us to go into those areas and divide those counties, is that your question?

Rep. Pope: Yes sir.

Rep. Fitch: No.

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[39] Rep. Pope: Mr. Speaker and members of the House, a lot of remarks we've heard here tonight, the Justice Department, the Voting Rights Act can be used as a whipping boy as an excuse for how terrible this map is. But we've seen several proposals in the form of amendments and bills filed which sought to comply with the Justice Department with the Voting Rights Act which still kept the remainder of the state fairly compact and contiguous. This is the only plan that has been presented that does have the 5th, 10th, 11th, and even parts of the 9th District intermingled with long fingers and dividing counties where it is not necessary to comply with the Voting Rights Act. Representative Flaherty's amendment and Representative Justus' amendment, they had compact 11th Districts. Comparisons have been made with Representative Balmer's plan, the bills he filed. All of them kept the 11th District compact and all the other areas of the state as compact as possible. So this is not the fault with the Justice Department, it is not even the fault with the Voting Rights Act, not the entirety of this scrambled eggs of a congressional district. It is pure partisan gerrymandering. And we've seen that in this debate as well. Representative Jeralds basically said it. If I'm quoting him accurately, he said power conceives nothing that the Democrat majorities, in this House is going to use its power to protect its incumbents, its overall majority in the Congress and in the General Assembly. And we've seen power in this General Assembly. Power to protect, used to protect incumbents, power over the constitution which the General Assembly has not to give the people the right to vote on the veto for the first time in our history. The power to increase spending and then increase taxes which takes away people's right to their own right, the right to earn, keep more of their own hard-earned money in order [. . .]

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HOUSE CONGRESSIONAL REDISTRICTING COMMITTEE

January 23, 1992

[2] Chairman Fitch: The Committee Chairmen present to you for your consideration this morning, the 1992 Congressional Base Plan #9. As you know, the Federal Government rejected a plan which this body ratified in July saying that we should have created a second majority-minority Congressional District. The purpose of this particular [plan] is to meet the requirement of the Federal Government by enacting a redistricting plan that has two districts that are majority black in population. The plan we present to you this morning is similar in most regards to the plan that was mailed out to you over the weekend. Let me, however, review for you some of the important features. First of all, we feel that this plan meets the one-man-vote requirement in population. Each district has a population deviation of either one person or zero people, thus the State should not be challenged on that particular basis. Second, the Plan goes beyond what we consider to be the requirements of the Voting Rights Act by creating minority districts. District One is 57.16% black in population and 53.3[%] black in voter age population. District Twelve is 56.63% black in population and 53.34% black in voter age population. We do not yet have the accurate voter registration statistics on these districts, but Harvey Gantt won each of these districts by substantial majority. We believe that this gives black citizens of the State a realistic opportunity to elect congress persons within their choosing. Although these majority black districts are spread out, they have commonalty. District One in the eastern North Carolina is largely rural in character. Only 18% of its population lives in cities of 20,000 or more. In contrast, District Twelve, which runs from Gastonia through Charlotte, Winston-Salem, Greensboro to Durham, 80% of that population lives in cities of 20,000 or more. In addition to these two majority black districts there are four more

districts, #2, #3, #4 and #8, that are over 20% black in population. This will give black citizens of those districts a substantial opportunity to influence the election of a person for congress from their district. We believe that our approach is superior to the one suggested by the Federal Government. The Justice Department suggested a second district running from Charlotte to Wilmington. Such a district does not have commonalty in existence between the people from Charlotte to Wilmington. The urban needs with the people of Anson and Bladen Counties are rural. In addition, such a district only would provide for a minority representation if blacks and Native Americans were to vote together and the voting record, as we have been able to investigate it and establish, does not bear out that that is a factual situation; thus we expect that our plan will work better for blacks than would the approach suggested by the Bush Administration. I will not go over in detail the composition of each district. Your statistical package contains maps of each. I will point to you the map of District Nine and Ten, which have been marked by substantially since the Plan that you received over the weekend. We have made each more compact in response to the concerns that were stated by many of you. In addition we have returned all of Congressman Ballenger's home county to the [3] Tenth District. We also made changes to the Second and the Fourth Districts which enabled us to make Franklin, Johnston and Chatham Counties whole. I have heard many concerns about the number of counties that are divided in this Plan and I would like to respond to those concerns. This body enacted a Congressional Redistricting Plan in July which divided no county into more than two parts. The Justice Department rejected that plan. Rep. Balmer introduced four Congressional Redistricting bills. Each of those divided a substantial number of counties into three districts. Indeed, one of his plans divided ten counties into three districts . . . one county into four districts. Rep. Justus' plan also

divided many counties into three districts. The plan that we propose keeps 57 counties whole, divides 35 counties into two districts and divides eight counties into three districts. Those of you who object to our division of these counties should have urged the Justice Department and the Bush Administration to accept the plan originally sent to the Justice Department. Finally, we think that this plan is fair on a partisan basis. We believe that it creates four districts, including the two majority black districts that are likely to elect Democrats . . . numbers One, Four, Seven, and Twelve. Three are likely to elect Republicans . . . numbers Six, Nine and Ten, and five that could go either way. We have tried to meet the dictates of the Bush Administration, the needs of the minority community of this State and the concerns raised by many of you and by many other citizens whom we have heard. We would urge your support for this plan.

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[5] Rep. Flaherty: Thank you Mr. Chairman. As I explained two days ago, when we were sitting up there in the Public Hearing I heard at least two people . . . one from the Black Leadership Caucus . . . one from the NAACP . . . indicating that they wanted us to consider two majority-minority districts and a strong influence district in the southeast and that seemed to be in line with what the Justice Department's letter indicated with respect to the southeast. The two minority districts that I have . . . the first one would be the Second District and I think that is far more compact than that proposed in this new Base Plan that has been submitted to us today. Not only is it more compact, but it would contain 53.15% of the voting age popu . . . or the registration would be black and that should be a district in which blacks would have influence and could win. District Twelve is the one that was pretty similar to the Merritt-Rose or NAACP and I have found that is the same or similar plan based

on a staff memo dated 10 January. So, I got an answer to that question. That is basically the same thing, but District Twelve . . . I asked them to rerun the figures as they did for the chairmen's plan and it indicates that District Twelve would be 53.7% black registration which, of course, would be a good influence . . . would be giving them influence and could allow them to elect a black congressman. The other thing that I think is very important is District Seven which would be the district going across the southeast. It does not go into Charlotte. It does not go into Wilmington, but it runs through the southeast . . . the rural areas of the southeast. The black registration in that district would be 41.27% which would give blacks a great deal of influence in that district and with the Native American population, the total minority registration is now 52.47%. I think that it is important to note even though it has been stressed that Native Americans and blacks have not shown any consistency in voting the same way, that when you look at the Republican registration, take that out, and then look at what is left in the Native American and black; particular[ly] in the [6] Democrat registration in a Primary I would find it hard to believe that anybody would argue that blacks would not have influence in the Democrat Primary in that district and could not in fact win. Another crucial thing with respect to that district, it gives the Native American population in that district a swing vote between the white population and the black population and I think that does do what was requested with respect to the Native Americans. Now it is my understanding . . . I don't know if this is totally accurate . . . but it is my understanding that Rep. Rose has indicated that he would not mind running in minority districts. So if you are looking to protect incumbents that would be a district that he could run in. One thing that I did not do when I ask[ed] staff to draw this map was to look at partisan issues. I did not have them do such things as go through the center of Caldwell

County . . . a county that has precincts . . . I think that every one of them have a majority registration Democrat . . . every one of them can be . . . we've got a Democrat Sheriff and a Democrat Clerk of Court . . . but what this plan does that the Committee Chairmen have passed out today goes right through the heart of Caldwell, hits those precincts that vote most heavily Democratic, and I am a little bit disappointed because I have won a lot of these precincts. I may have been the only Republican to carry them, but they took them out of the Congressional District . . . go right down in through . . . into Burke County as Rep. Decker had indicated . . . the people back home do not like this. I showed them the map that was sent to me and that problem has not been changed at all. I did not ask them to draw anything with respect to partisanships and I just asked that they make it as compact as possible. I did ask that they put Mitchell and Avery in the far West district with Yancey County. I was up there this Saturday and it was reiterated to me again by the leaders in both those counties that wanted to stay in the Eleventh . . . that they wanted to stay with Yancey County. I think that it is a far superior plan. I think it answers what the Justice Department has asked for and there are some other things that I would like to point out. With respects [sic] to the blacks, for example, in Cumberland County, they would be better covered in this plan that I have, I believe, than in the plan that the Committee Chairmen have. It also allows the blacks in Sampson, Wayne and Wake Counties to be treated similarly to blacks throughout the State. They are not put into a district just to save some incumbent congressman. I would ask the Committee to consider this plan very seriously. It is the only plan that I have seen where North Carolina could have three black congressmen elected to Washington. Under the Committee Chairmen's plan, assuming that things go the way they have in this State, there will not be three black con-

gressmen. I would ask you to support it and I would be glad to answer any questions.

• • • •

[7] (—:—): We all know that there is a lot of strictly partisan politics involved in this. We are all here protecting our backside and there is a lot of things involved, but how do you defend when you look on page . . . on the page that says "elections district summary" . . . how do you defend when you look at those statistics? You are saying you are going to elect three black congressmen, but on the flip side of that if you look at those statics are you not also packing into the three districts and creating a very good possibility of electing seven Republican congressmen and how do we defend that? I mean if our side is gerrymandering politically and packing . . . are you not guilty also of the exact same thing by looking at the statics [sic] of election results?

Rep. Flaherty: No sir. I understand your point because of the fact that you could argue that. I didn't ask them to go down into Caldwell County for example and find those precincts in a county that has all Democratic precincts . . . to find those precincts that vote the strongest Democrat and then put them into the Fifth District. That is what it does in Caldwell County . . . that's what it does in Burke County. I didn't have staff do that. I am not saying the Committee Chairmen did, but if they used . . . whatever plan they used . . . the person who originally drew that apparently did, because that's what happens in Burke and Caldwell. I didn't do that. Now I understand what you are saying in looking at the races, but if you will note you have got two races where we won statewide. That is not normally the situation in North Carolina Politics. Normally Democrats win statewide. So if you will look at these races, yes you could make that argument, but I don't think these races

are fair and accurate races to look at when you are trying to make an argument like that and I did not ask that to happen. I understand what you are saying and when you make minority districts and since the majority of minorities are Democrat registration, if you will look at the Democrat registration in District One, District Two, District Seven and District Twelve, you are taking a heck of a lot more Democrats out there than you would otherwise because the minorities have a tendency to register Democrat. The other thing that I think is important and one of the reporters asked me, does this not make a bunch of Republican districts. All twelve of these districts are majority Democrat registration and I can't believe that a strong Democratic candidate or majority candidate could not keep his party faithful to vote for him. All twelve of them are more than 50% registered Democrat . . . well, excuse me, one of them is 49.62. The others are all over 50%. So, no sir I don't agree with that.

• • • •

[8] Rep. Gottovi: The minority input that I have had from New Hanover County is that they would prefer to be in a majority minority district, but they liked the idea of being able to vote in that majority minority district that was created through the plan that we were sent last weekend.

Rep. Flaherty: May I make a couple of more comments and I will shut up?

Chairman Fitch: Rep. Flaherty is recognized.

Rep. Flaherty: As I indicated on the first day, these plans could be changed somewhat. One of the things that I would like to do is try to put more counties back together . . . take a piece from here and a piece from there and see if we can't put more counties whole. Another thing that can be done, and I explained this to Rep.

Michaux early on, if you could change these minority districts around . . . you could substitute for example . . . I've got Durham in the Second District whereas it could be in the Twelfth. That makes little difference to me. I don't really agree with the way the Justice Department is doing. I don't really agree with the way the courts have interpreted the one-man one-vote rule. I think it is absolutely asinine. However, you can play with this and you can get it to where it would be a good plan if it would be considered. I've not seen any other, as I have said, that would give minorities the chance to elect three congressmen in this State and this one can do it.

• • • •

STIPULATIONS OFFERED BY DEFENDANT-INTERVENORS

• • • •

1. In 1989, 27.1% of African Americans in North Carolina had incomes below the "poverty" level, as that term is defined by the federal Census Bureau, as compared with 8.6% of whites. Among families, 24.4% of African American families and 5.9% of white families lived in poverty. (U.S. Department of Commerce, Bureau of the Census, 1990 Census of Population: Social and Economic Characteristics, Tables, 8, 9).

2. African Americans in North Carolina comprise 22.07% of the State's total population. They constitute 45.4% of all persons living in poverty in North Carolina. (U.S. Department of Commerce, Bureau of the Census, 1990 Census of Population: Social and Economic Characteristics, Table 54).

• • • •

5. The following table compares incomes in 1989 of African Americans and whites:

	Median Household Income	Median Family Income	Mean Household Income
Black	$17,979	20,926	22,523
White	29,300	34,487	36,034
Difference	11,321	13,561	13,511
Percent Difference	38.6%	39.2%	37.5%

(U.S. Department of Commerce, Bureau of the Census, 1990 Census of Population, Social and Economic Characteristics, Tables 8, 9, 53).

6. In 1989, the average per capita income of whites in North Carolina was $14,450. The average per capita income for blacks was $7,926. (U.S. Department of

Commerce, Bureau of the Census, 1990 Census of Population, Social and Economic Characteristics, Tables 8, 9, 53).

• • • •

8. African American households in North Carolina receiving wages, salary, or self-employment income in 1989 had mean earnings of $24,176. For white households, the mean earnings figure was $35,880. (U.S. Department of Commerce, Bureau of the Census, 1990 Census of Population, Social and Economic Characteristics, Table 53).

• • • •

15. In 1990, 5.9% of African Americans over age 25 had less than a fifth grade education. Among whites, 2.3% lacked this level of education. (U.S. Department of Commerce, Bureau of the Census, 1990 Census of Population, Social and Economic Characteristics, Table 47).

16. As of 1990, 73.1% of the State's whites and 58.1% of its blacks were high school graduates. (U.S. Department of Commerce, Bureau of the Census, 1990 Census of Population, Social and Economic Characteristics, Table 47).

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20. In 1971, African Americans made up 20.8% of public school teachers in North Carolina, and 29.6% of pupils. In 1991, blacks comprised 16.2% of teachers, and 30.2% of pupils. (North Carolina Department of Public Instruction, African American Male Task Force Report, July 1992).

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31. In 1990, the civilian unemployment rate for blacks was 9.4%. The rate for whites was 3.6%. (U.S. Depart-

ment of Commerce, Bureau of the Census, 1990 Census of Population, Social and Economic Characteristics, Tables 8, 9, 49).

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33. In 1990, 24.7% of whites in North Carolina were employed in managerial and professional occupations; 12.6% of African Americans were employed in managerial and professional occupations. (U.S. Department of Commerce, Bureau of the Census, 1990 Census of Population, Social and Economic Characteristics, Tables 8, 9).

• • • •

35. The following chart shows the percent employment in 1990 of whites and African Americans 16 years and over in certain occupations in North Carolina.

Occupation	Percent White	Percent Black
Managerial and professional specialty occupations	87.7	10.6
Technical, sales and administrative support occupations	84.8	13.6
Service occupations	65.3	32.3
Operators, fabricators, and laborers	68.2	29.1
Handlers, equipment cleaners, helpers, and laborers	67.5	29.8

(U.S. Department of Commerce, Bureau of the Census, 1990 Census of Population, Social and Economic Characteristics, Table 50).

• • • •

38. The following chart shows percentages of black and white households in North Carolina for certain housing conditions.

	Percent Owner	Percent Renter	Percent Overcrowded [1] and Inadequate Plumbing [2]	Percent Lacking complete plumbing facilities	Lacking complete kitchen facilities [3]
White	72.9	27.1	.03	.7	.5
Black	49.6	50.4	.5	3.7	2.4
Other	54.3	45.7	.2	1.4	1.2
Whole State	68.0	32.0	.1	1.3	.9

[1 Footnotes omitted.]

(U.S. Department of Commerce, Bureau of the Census, 1990 Census of Housing, Detailed Housing Characteristics, Tables 6, 7, 17-21, 39-43).

• • • •

40. 11.6% of black renters below the poverty level reside in overcrowded units. For white poverty households, 4.2% live in overcrowded dwellings. Among homeowners below the poverty level, 7.4% of black households live in overcrowded homes; 2.2% of white households are overcrowded. Overcrowding is defined as having more than one person per room. (U.S. Department of Commerce, Bureau of the Census, 1990 Census of Housing, Detailed Housing Characteristics, Tables 45, 46).

41. In 1990, 23.4% of black households had no motor vehicle available. 6.2% of white households were without a vehicle. At the same time, 15.8% of black households in North Carolina did not have a telephone. 4.7% of white homes did not have a telephone. (U.S. Department of Housing, Bureau of the Census, 1990 Census of Housing, Detailed Housing Characteristics, Tables 6, 7).

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48. The number of cases of mortality per 10,000 live births for blacks during the period 1989-1990 in North Carolina was 473.6. The number for whites was 346.2.

(N.C. Department of Environment, Health, and Natural Resources, State Center for Health and Environmental Statistics, "Health Status of Blacks in North Carolina," Table 22, October 1993).

49. During the period 1987 to 1991, the median age at death in North Carolina was 74.3 for whites and 68.5 for blacks. (N.C. Department of Environment, Health, and Natural Resources, State Center for Health and Environmental Statistics, "Health Status of Blacks in North Carolina," Table 25, October 1993).

50. In North Carolina a white male child born in 1990 has a life expectancy of 71.8 years; a white female can expect to live to age 79.7. Male minorities have a life expectancy of 65.7 and minority females, 74.7. African Americans make up 90% of the minority population in North Carolina. (Office of State Planning, State Center for Health and Environmental Statistics, 1989-91 Data).

* * * *

60. Of the 14 African Americans who have served as Resident Superior Court Judges since court reform in 1967, 12 assumed the office after the effective date of Chapter 509 of the 1987 Session Laws. Chapter 509 created eight majority black districts and one combined black/Native American district for Superior Court.

* * * *

63.The following table shows population and registration for Black and White voters in North Carolina.

[Table reproduced landscape in this printing at 299a.]

* * * *

76. As of January 1989, blacks constituted 21% of the voting age population in North Carolina, and 8.1% of all elected officials in the State. Of 5,554 elected officials, 449 were black. Of 170 state legislators, 15 were black. The highest concentration of black elected officials was

in municipal governing bodies, in which 262 African Americans served. There were 82 black members of local school boards and 42 members of county commissions. Of 100 sheriffs, 4 were black. (Black Elected Officials, Joint Center for Political Studies Press, 1989).

77. No African American person was elected to the North Carolina General Assembly from 1900 until 1968, when one African American was elected to the House. No black person was elected to the Senate until 1974, when two black senators were elected. (Keech & Sistrom, *The Implementation of the Voting Rights Act in North Carolina*, Table 11).

* * * *

80. In 1973, North Carolina's 100 counties were governed by a total of 521 county commissioners, of whom 8 were black. In 1989, there were 529 elected county commissioners, of whom 36 were black, and 3 were American Indian.

* * * *

63. The following table shows population and registration for Black and White voters in North Carolina.

Date[1]	Total Reg. Voters	White Reg. Voters	White Reg. Voters as % of Total Reg.	Black Reg. Voters	Black Reg. Voters as % of Total Reg.	Total Voting Age Population (VAP)[2]	White VAP	Black VAP	Percent of White VAP Registered	Percent of Black VAP Registered
1970	1,945,187	1,639,704	84.3	294,880	15.2	2,997,410	2,407,434	565,463	68.1	52.2
1980	2,774,844	2,313,722	83.4	439,713	15.9	4,224,031	3,299,160	857,241	70.1	51.3
1985	2,976,432	2,386,622	80.2	564,509	19.0	4,623,260	3,600,850	932,550	66.3	60.5
1986	3,080,990	2,467,561	80.1	585,348	19.0	4,703,105	3,661,187	947,611	67.4	61.8
1987	3,092,138	2,476,753	80.1	589,203	19.1	4,782,951	3,721,525	962,673	66.6	61.2
1988	3,432,042	2,750,667	80.2	648,213	18.9	4,862,787	3,781,863	977,735	72.7	66.3
1989	3,054,689	2,475,562	81.0	549,427	18.0	4,942,642	3,842,201	992,796	64.4	55.3
1990	3,347,635	2,677,162	80.0	635,045	19.0	5,022,488	3,902,539	1,007,856	68.6	63.0
1991	3,419,561	2,737,638	80.1	645,264	18.9	5,022,488	3,902,539	1,007,856	70.2	64.0
1992	3,817,380	3,064,242	80.3	710,209	18.6	5,022,488	3,902,539	1,007,856	78.5	70.5
1993	3,483,606	2,827,868	81.2	617,876	17.7	5,022,488	3,902,539	1,007,856	72.5	61.3

[1] October figures for each year except 1970, for which figures are from December 15, 1970.

[2] Voting Age Population for years 1981 - 1989 are interpolated using 1980 and 1990 population figures and assuming constant population growth during the period.

(9) (1)

Nos. 94-923 and 94-924

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RUTH O. SHAW, *et al.*,

Appellants,

v.

JAMES B. HUNT, JR., *et al.*,

Appellees,

and

RALPH GINGLES, *et al.*,

Appellees.

JAMES ARTHUR "ART" POPE, *et al.*,

Appellants,

v.

JAMES B. HUNT, JR., *et al.*,

Appellees,

and

RALPH GINGLES, *et al.*,

Appellees.

Appeal from the United States District Court
Eastern District of North Carolina,
Raleigh Division

JOINT APPENDIX
Volume II of II
(pages JA-301 through JA-706)

[Counsel listed on inside front cover]

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(2) August 5, 1991 Letter from Republican State Rep. David G. Balmer to John R. Dunne, Assistant Attorney General, United States Department of Justice (Exhibit 22). JA-78

(3) September 27, 1991 Letter from Republican State Rep. David G. Balmer to John R. Dunne, Assistant Attorney General, United States Department of Justice (Exhibit 23). JA-80

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IV. TRIAL EXHIBITS AND MAPS (A complete copy of Stipulation Exhibits 10, 42, and 53-63, Plaintiff-Intervenors' Exhibit 301, and other maps designated by the parties have been lodged with the Court.)

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D. Order Denying Motion to Amend and Add Findings, September 1, 1994 . . . . . 155a

TESTIMONY OF DR. THOMAS B. HOFELLER

March 28 & 29, 1994

• • • •

[52] Q. Dr. Hofeller, before the break we were looking at the criteria that guided the Redistricting Committee's process. We went through the five criteria. One of the criteria had to do with contiguity, if you recall, and [53] specifically that districts shall consist of contiguous territory. How would you define contiguity?

A. In the general sense, I would say the district is all in one piece, functionally. I would say there would be two qualifications one could look at if one had a detailed map of the district. One could put a pencil down at any point in the district and trace around the boundary, outer boundary of the district, including portions of water that are in the district all the way back to the point of beginning without having to lift the pencil off the page, and without touching or crossing any line or portion of the line previously drawn.

The other test would be to say that a person could walk or drive or swim or row. In essence, travel from any single point in the district to any other point in the district without leaving the district.

Q. If you applied those two tests to Districts 1 and 12 in the current plan in Chapter 7, would those districts be contiguous?

A. No.

• • • •

[67] Q. And what's the basis for your applying geographic compactness approach?

A. As a redistricting expert in this particular area, I would be keying off the geographically compactness requirement of the Gingles threshold test.

Q. What is your understanding of what the Gingles — by the Gingles threshold you are referring to the standard in Thornburg v. Gingles in the Supreme Court?

[68] A. First we're talking about geographic compactness of the minority group. We're talking about cohesiveness of the minority group, which means they vote together. Their vote is effective as a group, and we're talking about the fact that there exists racial or bloc voting dilution. There's bloc voting such as it causes the candidates of the minority to be defeated in elections.

Q. That's your understanding of the Gingles compactness threshold?

Q. Yes.

A. My understanding of the compactness threshold comes from its language says geographically compact, meaning close together or in the same area.

Q. Can you cross that geographic compactness threshold in North Carolina in — could you have crossed it in 1991?

A. I think that it would be reasonable, certainly, to say that if the state made an examination of the geography, particularly with regard to black concentrations and particularly in the northeast, that it would be reasonable for them to come to the conclusion that a minority district is required.

* * * *

[70] Q. Would you conclude — would you conclude from that distribution of black population that you created a geographically compact district in that area?

A. I don't think you could ever analyze it as being geographically compact, no.

Q. Can we turn to your overlay for this map, which is in the exhibit book as Map 9B and explain what that represents?

A. That map has District 12 in green overlaid on top of the base map, which is the block group. Geographically, it shows the pathway that the district takes through these block groups picking up the separated concentrations of minority population along the way, with an off-shoot to Winston-Salem. Starts over in Durham and ends up in Gastonia, which is down on the lower left part of the map, which one can barely see. That's given by way of orientation so that the court can see how the district relates to the underlying demographic geography.

Q. With that overlay you still — would you still [71] conclude that the black population of that district is not geographically compact?

A. I don't know how anybody looking at the map could ever conclude the population is geographically compact.

Q. Could I ask you to make the same analysis for Congressional District 1 in the current plan, Chapter 7?

A. Yes.

Q. Referring you to Maps 7A, which we looked at earlier, and 8, with the overlay and could you make the same analysis in terms of the compactness of the black populations for District 1?

A. Well, again, although the underlying census geography shows a large number of block groups which are heavily black, they are scattered all over the eastern portion of the state, with the exception of the northeast, where there's a large contiguous concentration of black residences.

And I think as you overlay the green overlay of District 1, you can see how District 1 has wandered around the eastern part of North Carolina with tunnels and offshoots in many different directions, and even retracing

its path. First go south, then north, up to Fayette. I can't reach a conclusion from looking at this map and shape of the district. If that's a district intended to identify a geographically compact grouping of [72] blacks into one district, it certainly hasn't been successful in proving they are compact. If anything, it's more scattered than District 12.

Q. Mr. Hofeller, you made mention of Fayette; did you mean Fayetteville?

A. Yes.

Q. Dr. Hofeller, do you have an opinion on the relative geographic compactness of Districts 1 and 12 as compared to other districts around the country you are familiar with?

A. I would say that there are some other districts, particularly in some municipal areas that are as bizarre, certainly this would be as bizarre in shape and compactness among the top ten in the country, and indeed, because of the contiguity by touch and the narrow extended corridors and the by sectioning and trisectioning of districts, this will probably be the textbook example for the decade of non-compactness.

* * * *

[73] Q. Dr. Hofeller could you compare — could you explain the significance of Map 11, please.

A. Map 11 is the same district as Map 10, only it's divided into two types of areas, one colored orange and one colored green. And this map is a result of my detailed investigation of the 1st District, in most places a block by block examination, where I looked at the percentage of black population down to a very detailed [74] level. I then attempted to unify all of the black areas and communities within the district into the green areas and I think being rather liberal in terms of con-

necting those black areas through white, essentially white blocks that were low in population or had zero populations, and to show where the black population actually lives within that district.

The area that was then left over was the orange area, which is the predominantly white area of the district. This is supported by another exhibit further down.

Q. Before we get to that exhibit, this map indicates that it represents black communities and white communities and you mentioned black areas and white areas.

What do you mean by black communities and white communities and how did you arrive at that definition?

A. Again, I went down to the block level and I looked at the percentages of the blocks with particular emphasis on blocks of over auto percent and over forty percent black population and even adjoining blocks with the color which I had on my other maps, which is yellow, which is 30 to 40, and tied them together. And any white blocks that were in the middle of that area or which were adjacent to it which were zero in population, there are a lot of blocks that have no people in them, a lot of blocks throughout the state, so in many cases I was able to [75] connect centers of black population to one another to make a larger unit. It's really a detailed distribution.

Now, there was some counties in the northeastern portion of the state where the black population is very highly concentrated. In those areas it became obvious to me it would be probably better to look for the few isolated white communities that were in the areas, so I again tried those together.

Q. Would it be correct to assume Map 11 was constructed using your computer system with data provided by the North Carolina legislature?

Mr. Stein: Objection, leading, your Honor.

Judge Phillips: Overruled.

A. The data that was provided by the North Carolina legislature were the assignments of the blocks to the district. The other data that was used was, of course, the census data from the official census TIGER file and the tabulations from the PL94 data, so those are the three sources of the data that I used. And yes, I did do it on the RNC system.

Judge Phillips: Do I understand what you are saying, in effect, is that the green areas represent at the block level areas in which blacks constitute at least 30 percent of the population and the intervening areas in which there's no population?

[76] The Witness: Not quite, your Honor. The emphasis was on tying together the majority black areas or at least over 40 percent that were contiguous to one another.

Judge Phillips: I thought you said you got down to 30 percent.

The Witness: If the blocks were nearby and adjacent to the black area.

* * * *

[79] Q. Dr. Hofeller, I had asked you why you had undertaken to construct a plan for North Carolina congressional districts that contained two majority minority districts.

A. When the court is looking at a congressional district plan, I think it's always helpful to have something to compare it to. And I didn't find in the record, at least as I went through it at the time that I drew these maps, [80] an example which I thought was suitable to demonstrate how a more narrowly tailored and more compact map could be drawn for the state of North Carolina, which would contain a majority of minority inhabitants.

So, I took the concentration in the northeast portion and essentially made a district connecting it to Durham and also took a concentration in the south central, south portion, so this is by way of a sample plan to demonstrate to the court what is possible; and in a second sense, also to show as you attempt to increase the percentage of black population in minority districts after you hit a certain threshold of population, you start to get districts that are more and more black, lacking in compactness with more indentations. If you carry it out to extreme, you end up with a District 1 type district in the eastern part of the state.

Q. Dr. Hofeller, am I correct in assuming that the map that you described that you drew is Map 3 at Tab 3 that's come to be known as Shaw 3 and the same map is reproduced in large scale beside you?

A. Yes.

Q. Could you explain in summary what Shaw III does?

A. Well, in summary, it creates two minority districts; one located in the northeastern portion of the state, which is the location of the very obvious concentration of [81] black inhabitants, and then it created another district which is a combination of the black minority and the Native American minority, which goes from Fayetteville and Robeson County across the southern part of the state and into Charlotte in Mecklenburg County.

After I had drawn those districts, I found out, much to my pleasure, that you could create a rather coherent 2nd District, which would be the northern coastal district, and the reason why it's got a little oddly shaped in terms of Wayne County is that the incumbent lives in Wayne County, so as opposed to Shaw II, which was the previous map in the book, a little bow to the incumbent stretches the map a little more out of shape in terms of compactness.

I then built District 7 in the south part of the state along the coast and inland. Then, as is common in redistricting practice, I started out at the other corner of the state, built a District 12 in the far west, and 11. I then constructed District 5 or 4 using all of Wake County, Raleigh, and the remaining portion of Durham and the portion of Granville, which is at the southern end, and found I was a few people short, so I had to go into Orange to pick up the additional population. Then District 5 was formed of the remaining part of the central eastern part of the state. 6 was formed using the left [82] over from Alamance County and all of Guilford County and Randolph County and needed a little more, so it went over into Davidson. I next formed 8 and balanced it up with 11 and that left 9 and 10, so it's an attempt to create a plan that makes some sense and has reasonable compactness and yet creates minority districts within the state.

Judge Phillips: Could I ask, Doctor, looking at your District 1, how close you come to point contiguity on the southwestern-most extension?

The Witness: You mean in Lenoir County, your Honor?

Judge Phillips: I'm not sure.

The Witness: On the south part?

Judge Phillips: The southwestern corner of the district, as I see it, is a finger that runs down, has several fingers sticking off. I wondered how — why those would be, or is it that precise?

The Witness: Those, I believe, if my memory serves correct, are whole precinct units. They are considerably larger than blocks.

Judge Phillips: There's no way to tell from this how wide they actually are?

The Witness: No, if you Honor — if the court wanted that information, I could produce it. I can say to you it's nowhere approaching the slenderness of the [83] corridors through which the present plan does.

By Mr. Hess:

Q. Does either of the majority minority districts you created reflect any element of point or double crossover contiguity?

A. No.

Q. Do any of the other districts in Shaw III, I think, either point or crossover contiguity?

A. No.

A. Dr. Hofeller, are you maintainng that if you were North Carolina's redistricting expert, you would conclude the Voting Rights Act requires the creation — the creation of those two majority minority districts?

Mr. Stein: Objection.

Judge Phillips: Overruled.

A. Well, from the beginning I would be making that determination, I would be recommending what could possibly be made. I would have to repeat the answer that I gave previously. That is, certainly the State would be within the bounds of reason, well within the bounds of reason, to conclude that the 1st District may trigger the compactness or the geographic compactness criteria of the Voting Rights Act and certainly 3 might come close, I think it's a little less certain, but again, might be within the bounds of reason. I would certinaly tell them to look at [84] it very carefully and make the decision with a lot of deliberation.

Q. Dr. Hofeller, since geographic compactness is an issue in this case, I would like to follow up on the court's question about the little squiggles on your majority minority districts.

Could you explain, for both of the districts, your Districts 1 and 3, why you have those odd shapes a' ached to the rest of the districts?

A. In the case of the 1st District, the extensions around the perimeter of the district are extensions out to pick up nearby black communities, particularly in Lenoir . . .

* * * *

[86] Q. How was this map produced? What sort of data did you use to develop it?

A. Again, it was the data provided by the Census Bureau with the outlines of the districts provided by the State. I have produced it on the RNC system. If I move along to —

Mr. Stein: I would like to note the same objection made here as to his characterization of white and black neighborhoods.

* * * *

[92] Judge Phillips: Could I ask one further question for general clarification of your testimony. What marks the boundaries of this district, than the others where jurisdictional lines are, not what marks the boundary. There are some portions of the boundary of the district and of all the districts, as I understood the testimony, which do not follow any jurisdictional boundary.

The Witness: Your Honor, I would have to say a major portion of the boundaries of the minority districts do not follow jurisdictional boundaries, and therefore, the districts which adjoin them, that is right, non-minority districts.

Judge Phillips: What does constitute the boundary where there's not a jurisdictional boundary?

The Witness: I would have to say, for the most part, it's a precinct boundary.

Judge Phillips: That's a jurisdictional matter.

The Witness: It's a voting district. And then —

Judge Phillips: If I include in my description of jurisdictional boundaries precinct boundaries as well as county, are there still portions of the boundary which are not defined by any jurisdictional?

[93] The Witness: Yes, Your Honor.

Judge Phillips: What are they?

The Witness: They are blocks, census blocks.

Judge Phillips: Is it possible, notwithstanding they are not jurisdictional boundaries, for a surveyor to go out, referring to some public document, and run a line and tell a person whether that person lives within a particular district?

The Witness: Yes, your Honor.

* * * *

[98] Q. Dr. Hofeller, do you have an opinion on whether with regard to precincts splits whether white precincts were created any differently from black precincts?

A. My in-depth examination of this district leads me there were two type of splits, one was for corridors which essentially splits the district from one concentration to another, and the second type of precinct splits were to reach out from black precincts to adjoining, less black precincts, or white precincts, to take off blocks which had high concentrations of black voters. So, in essence, those splits were done to unite, to some degree, the black community within that city and the splits

through the corridors were not done for any other reason but transportation. The width of those corridors becomes very important.

Q. Why is that, Dr. Hofeller?

A. Well, if I were constructing a minority district such as this, and as I watched other people construct them in all my time in redistricting, the way this is usually done is one goes to one's information system, whatever it is, and identifies the concentrations of black voters or inhabitants either by VTD or voting precinct in this case [99] or in many other states they use block groups of census tracts and one uses the system to put all of those concentrations into the district.

Now, two things may happen. One, you then may have more population than the district needs to be a complete district, and you have a problem because you haven't connected those concentrations anyway, so you have to cast off some of those concentrations in order to make corridors through non-minority areas to connect the various neighborhoods.

On the other hand, you may find that after you assigned all of the minority neighborhoods or concentrations to the district, you don't have enough population so you have two problems. You have to get more people in order to meet the one-person, one-vote rule and you have to connect these dispersed centers of population.

If the corridors through which you travel get too wide, the population of them grows and that dilutes the district, so the only way that this district could have been constructed was by extremely careful attention to the numbers of people in the connecting blocks in comparison to the size of the black neighborhoods. And that would have, indeed, become the overriding criteria in terms of how you mechanically went about drawing this district. Because if you make those corridors any wider than black [100] precincts or portions of black precincts

have to fall off the black concentrations, the percentage drops down, and soon you are not at the level for a district as a whole that you want.

Q. Based on your analysis of this pattern of precinct splits in District 12, do you have an opinion on whether black precincts and white precincts were treated differently?

A. Yes.

Q. What is that opinion?

A. I think, for the most part, white precincts were used as corridors and black precincts were combined together. Indeed, that would be logical in terms of the goal of creating a minority district.

Q. Dr. Hofeller, let me turn you now to your Maps 18 and 19 at Tabs 18 and 19. Can you explain to the court what those maps represent?

A. Map 18 is a map of the portion — a portion of Forysth County, the Winston-Salem area. The light blue lines, or the very light lines, represent the boundaries of the block groups in that area, and the very heavily-shaded black lines are the boundaries of the districts in the present plan, Chapter 7. And the purpose of this map is to show how the highly black block groups in Winston-Salem were fractured by the district boundary [101] in the building of the 12th District, and were divided between the 5th District and the 12th District.

My attention was called to this as I was doing a detailed study of the district, in going through it on a block-by-block level, and one of the most bizarre features of the plan is the extrusion from Mecklenburg into Gastonia, extremely narrow corridor to pick up a black population there, and I said, why would the designers of this plan have fractured a rather large community in Winston-Salem and gone into Gastonville (sic) when I

believe there are enough minority residences on the periphery of the district in District 5.

So, if you unified, unfractured the community in Winston-Salem, you would not have to extend into Gaston County at all. And so I did a little trial, which these two maps demonstrate, to show, indeed, if you united the black community in Winston-Salem. There's enough population there to offset the population in Gaston County and you will not lose the percentage of black population.

Q. Do you have an example of your trial map?

A. The trial map is essentially Map 19. Map 19 is a precinct map because the state's plan is ordered along precinct lines, and I have filled out the rest of the black precincts in Winston-Salem, both going out to catch more black precincts, and dropping off in the eastern [102] portion of the county, three majority white precincts less than 20 percent at the same time. And this exchange of population for these three precincts and Gaston County for this black community, in reuniting this black community into one district allows the withdrawal of the district from Gaston County.

Q. Dr. Hofeller, what's the significance of that alternative configuration?

A. In my belief, it represents an example of a more narrowly tailored solution to the formation of this district than the alternative taken by the State.

* * * *

[104] Q. How do you mean?

A. Well, I know there's an anecdote says if you open your car doors and drive down the length of I-85, you will [105] kill half the people in the district. Obviously, you won't kill any people in the district, and if you drive down I-85 from the western end of the district in Gasto-

nia to Durham, indeed much of the time you will be outside of the district.

I studied the pattern along the freeway I-85 and found that if you went from the west end of the district to the east end of the district, you would cross in and out of the district 21 times; whereas, if you went from the east end to the west end, you would cross in and out of the district 17 times. So, as it turns out, sometimes what side of the division of the interstate you are on determines whether or not you are in the district, and sometimes that refers at some point, and there are even a couple of points where you wouldn't be in the district unless you were in the correct lane, going in the right direction. So it actually divides one side of the interstate.

* * * *

[109] Q. Dr. Hofeller, would it be — do you have an opinion on the relative stability of precinct lines versus other jurisdictional lines, such as county lines and municipal boundaries?

A. I would say that in terms of stability, county lines are very stable. In many areas a lot of county subdivisions are stable. Of course, municipal boundaries are subject annexation so where annexation would occur, the lines may change and, indeed, some precincts may roll out and shift with those particular changes. But it's a boundary which could change at any time, even within a city or county or any county district.

Q. And Dr. Hofeller, can we turn now to your Tab 20, that's 20A and B. Could I ask you to explain it to the court, the significance of those maps.

A. Maybe we could project that map? Map 20A and 20B are enlargements of Gaston County. The boundary lines which are on the map are the actual census blocks which comprise the area to which the blue shaded dis-

trict passes, that's the present planned District 12 on Map 20A. Exits Mecklenburg County and travels westward toward Gastonia. That particular map shows the populations of each one of [110] the blocks, and it's clear to see how the drafter of this plan has attempted to trace the line of connection between Mecklenburg and Gastonia through the blocks that have the lowest population, what we might call in redistricting, the point of least resistance.

They goofed in a few places, but I think I could attribute that to just not seeing it or highways. It shows the district passing through many blocks with low population, maybe along the interstate highway.

Q. What's the significance of passing through blocks with little or no population?

A. When you make narrow tunnels like this, it's evident you are going from one place you want in the district and have a significant impact on the district to another place that you want to have a significant impact on the district population-wise, but you don't want the tunnel to have any impact on the district, so you've deliberately minimized its population.

Q. Could one assume from these two maps that the line that you've illustrated split precincts?

A. Not from this map. That was shown in the map we covered previously, and this is the same area, and I know from my examination, and it's clear from that map this is the area of Gaston County which is on Map 16 —

Judge Phillips: Haven't we got that pretty well [111] settled, the precinct split throughout this?

Q. Well, let me ask one final question about precincts. Dr. Hofeller, do you have an opinion on how the precincts splits, as you have been describing, measure with the stated criteria to minimize precinct splits as we discussed earlier?

A. It appears to me, from my detailed examination of the current districts, the precincts were used as the basic building block of the plan, but whenever it was politically expedient for any other goal, particularly in building the minority districts to do so, the precincts were split almost at will. And, indeed, many, many more precincts were split in this plan than would be necessary for any other purpose except to build a district with one characteristic.

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[122] Q. Given your nation-wide redistricting experience, have you had occasion to compare the compactness of the current congressional plan with other states?

A. There are perimeter circle and circumscribing circle measurements that I have seen and indeed, these are among the lowest. I might add here, though, that even in terms of compactness measurements, when we consider compactness and we look at compactness when you are evaluating a plan, lack of compactness is a red flag, so to speak. It's an indication that if you're investigating the nature of districts, that you should perhaps look a little harder at the districts that are non-compact and try and ascertain why they were drawn the way they were drawn.

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[124] Q. Dr. Hofeller, do the maps and data in your investigation of North Carolina's congressional plan lead you to any conclusions?

[125] Mr. Speas: Objection.

Mr. Stein: Objection.

Judge Phillips: Sustained.

Q. Dr. Hofeller, I'd like to ask you to summarize for the court the significance of the maps and data you presented here today.

Mr. Speas: Objection.

Mr. Stein: Objection.

Judge Phillips: I think we have had his conclusion stated several times, Mr. Hess, in the course of his testimony to this point, but in the interest of concluding it, let's let him answer what you asked him as far as he can understand it.

Q. Do you understand the question, Dr. Hofeller?

A. I believe I do. First of all — and in summary, I would say number one, the minority districts that are created in the current plan are not geographically compact or are not comprised of geographically compact minority concentrations.

Two, that the minority districts in the current plan presented by the themselves would not support a Section 2 geographic compact finding. At least I would not recommend that they would to somebody if I were advising them.

Three, that this — there exists a more narrowly [126] tailored or more compact solution for the minority districts in North Carolina which is more in line with traditional redistricting criteria.

Three, or four I'm sorry, that the state of North Carolina, at least the committee adopting a criteria for the creation of districts, really had no independent policy of its own. It was just adopting operationally, the federal policy which it would have had to follow anyway.

I guess, lastly, that the shapes and configurations of the North Carolina districts will probably be the textbook example of redistricting in terms of bizarre districts and examples of perhaps disputes over the shape and nature of the districts.

Mr. Hess: Thank you, Doctor, I have no further questions at this time.

Judge Phillips: Mr. Everett, do you have direct examination for this witness?

DIRECT EXAMINATION

Mr. Everett: One or two questions.

By Mr. Everett:

Q. In connection with your last conclusion, your statement of conclusions, what conclusion do you have as to the extent to which white and black populations are segregated from each other by the districts that have been [127] adopted?

Mr. Speas: Objection.

Mr. Stein: Objection.

Judge Phillips: Sustained.

Q. Would you state what conclusion you formed as to the separation in terms of race in the plans that are currently effective in North Carolina?

Mr. Speas: Objection.

Mr. Stein: Objection.

Judge Phillips: Overruled.

A. I think I could best answer that by stating that everything that I have looked at with regard to the districts that have been formed leads me to the conclusion that the overriding criteria which was used in the creation of the minority districts was the black population percentage and was race, and that that was the purpose for which the districts were drawn. And it was the purpose for which the plans out of which they were generated, the plan out of which Chapter 7 was generated, was drawn. And it's very difficult for me to see, from the shape of the districts and looking at the block by block configurations, that there would be any other reason.

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[139] Q. Let me ask you specific questions about it. Do you concur the purpose of redistricting is to provide fair and effective representation for voters?

A. Yes.

Q. Do you concur that one-person, one-vote requirements and racial fairness requirements are critical to providing fair and effective representation?

A. I think within the bounds of the law, yes.

Q. Do you still subscribe to the view that some — do you still acknowledge some scholars don't place much value on geographic compactness and redistricting?

A. Some, yes.

Q. And in this particular page, don't you quote a professor Kane, who describes geographic compactness "out-dated, irrelevant or even a positive nuisance."

A. The Dr. Kane who was the Democratic consultant for the Burton gerrymander, yes, I don't subscribe necessarily to his viewpoint, no.

Q. But then let me ask you about Dr. Kane. I don't believe you are employed by university, are you?

A. No.

Q. Dr. Kane is, isn't he?

A. Yes.

[140] Q. Which university?

A. I believe right now he's at Berkeley.

Q. A respected institution, I believe?

A. Certainly a highly ranked institution.

Q. Is he tenured there?

A. I don't know. I'm not sure tenure makes his views correct.

Q. Dr. Hofeller, do you know what the criteria of the University of Berkeley applies in deciding to award tenure?

A. I image rather stringent.

Q. Don't you think one of them is scholarship?

A. Yes.

Q. Dr. Kane's been at Berkeley a long time, hasn't he?

A. I don't know exactly when he went there. I think he's been there through this redistricting cycle. He was at Cal-Tech before.

Q. Dr. Hofeller, in your article which you co-author, don't you express the view, "In the modern age, geographic compactness is not as important as it once was"?

A. To some extent.

Q. I'll refer you to page 1160 that of that article, Doctor, and ask you whether on page 1160 you say that it has less strength than it used to?

A. I'm sorry, could you tell me what paragraph that's [141] in?

Q. It's in the first, beginning paragraph, Dr. Hofeller. "This argument was perhaps especially significant in the past, but loses some of its strength in an age of telephone, computers, superhighways and airplanes."

A. I'm sorry, I'm just confused. I don't see it.

Q. Page 1160, first — beginning paragraph, midway through the paragraph, this argument was perhaps especially significant. See that?

A. Yes, I see it now. Thank you very much.

Q. And in that sentence doesn't it state that geographic compactness is less important because of superhighways and other means of transportation?

A. I think in my conversations with Professor Grofman and Professor Niemi. Since this article was written, I could fairly assume if we had anticipated the kind of compactness abuses that have been perpetrated in the 1990 cycle that we perhaps would have phrased this somewhat differently.

Q. Judge Phillips: Let's take a 15 minute recess at this point.

(Recess taken.)

By Mr. Speas:

Q. Dr. Hofeller, would you agree that the value or one of the values of geographic compactness is allowing [142] members of congress, or elected representatives rather, to keep in touch with their constituents?

A. Yes, that would make sense.

Q. Would you agree that geographic compactness is less important when the elected representative is full-time representative than it is when the representative is only a part-time representative?

A. Are you talking about at the state level or congressional level?

Q. Actually, I'm comparing state house/senate members with congressmen.

A. I don't think you can really compare state legislative districts to congressional districts. Congressional districts are very, very large and take much more time to get around.

Q. But you would agree that if the elected representative is full time, geographic compactness is less important, wouldn't you?

A. It depends on the degree.

Q. Would you agree that when the elected representative has a relatively large staff and budget, that geographic compactness is less important?

A. If that budget is used to staff offices which are about the district. However, I think there's probably some need for the legislator himself to visit the [143] district, too.

Q. Dr. Hofeller, I would assume that geographic — well let me rephrase the question.

You said in this article that geographic compactness is less important in light of modern transportation facilities, correct?

A. That's what the article states, yes.

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[152] Q. Based on your experience, Dr. Hofeller, is it true that urban voters have common interests and concerns that affect the role of a congressman or responsibilities of a congressman?

A. Among many other concerns, yes.

Q. Would it be appropriate, based on your experience, for a state to draw a district that created a largely rural district — that was not a good question — but would it be appropriate for the state to draw a rural district; yes or no?

A. Yes. Again, it depends on the type of rural district.

Q. Would it be appropriate for a state to draw a district where relatively poor citizens are grouped together, yes or no?

A. Again, yes, but it depends on the circumstances.

[153] Q. Okay. And would it be true, Dr. Hofeller, that whether the district is urban or rural is, as you state in

your article, not determined merely as a side effect of a compactness measure?

A. I'm sorry, would you repeat that question again for me.

Q. Would it be true, as stated in your article, that whether a district is urban or rural cannot be determined merely as a side effect of a compactness measure?

A. Yes. I think you if you look at the shape of the district, it's not possible to tell what the demographic shape of the district is, you have to go farther than just the shape.

Q. Your compactness issues tell us whether or not whether — nothing about whether the first is a relatively rural district or 12 is a relatively urban district?

A. No, not at all.

* * * *

[163] Q. Let me — you spent a good deal of time on direct examination today talking about the series of maps that you had that go from Mecklenburg west into Gaston County. Could you describe the geography of that region and the nature of it in terms of employment and whether it's rural or small towns or cities or suburb and/or what?

A. You are talking about the current 12th?

[164] Q. I'm talking about Gaston County, North Carolina?

A. Certainly my impression from looking at the maps and configurations of the streets would say that it's either suburb and/or an older city, surrounded by a suburban area. It's residential in nature.

Q. And are you describing the whole area from Gastonia to Charlotte?

A. Yes.

Q. And do you know what the nature of employers are in that area; what short of sort of employment there is?

A. Not specifically, no.

Q. Do you know with respect to your Shaw II or Shaw III, the percent of the population in the district that includes Charlotte, the percent of that population which would be described as urban?

A. The percent of the district?

Q. Yes.

A. I can't quote it off the top of my head but it's readily ascertainable from the exhibits.

Q. Well, is that more or less urban than the present District 12?

A. The portion in Mecklenburg?

Q. No, the district.

A. I would have to say it's probably less urban.

Q. Have you traveled in that portion of the state from [165] Charlotte down towards Fayetteville?

A. No.

Q. Of course, the legislators who are making the decisions about which parts of the state would be in which districts were collectively familiar with all parts of the state; were they not?

A. Collectively familiar with all parts of the state?

Q. Yes.

A. I would hope so, some would know about one part, others would know about another part.

Q. Some would know about all of them, wouldn't they?

A. My experience in redistricting has been that many more feel they know about it than actually do.

Q. Now, let me ask you about a particular district. When you drew Shaw II, it ended up that David Price, who lives in Orange County, did not live in and his district included Wake County and some other areas was not connected to Wake County; is that right?

A. The residence — his residence was about six blocks outside of District 4. I might add here, too, I think it would be important to clarify at this point that the Shaw III plan is not offered or presumed to even be offered as any sort of remedy. Its main function here is to demonstrate what sort of minority districts could be drawn and what sense could be made of the territory out of them.

[166] I presume if, for some reason, the districts in Chapter 7 were no longer valid, probably the legislature would redraw the districts, and I would feel confident the legislature would watch out for the Democratic interests fairly well.

Q. Now, following up on that, you have appeared as a witness both for plaintiffs and defendants; have you not, in Section 2 cases where a current plan is being attacked for failure to afford equal opportunities to a minority community to elect representatives to their insurance of their choice?

A. I'm trying to think where I might have been — yes, I have, yes.

Q. And typically in a Section 2 case, a sample plan of the sort you're describing here is offered to show that it is indeed possible to, assuming the other two threshhold of measures in the Gingles test are met, but it is possible to draw a geographically compact district which includes a majority of the minority who's seeking relief, just as a

plan similar to the one that you have here as Shaw III; isn't that so?

A. If I interpret your question correctly, and tell me if I have it wrong, what you are saying is if you were mounting a suit — an action against an existing plan because it didn't have enough minority districts you think [167] it violated Section 2, you would offer a proof that the Gingles threshholds were crossed, and part of offering that proof is to say here's how you would do it.

I think the important consideration here is to understand that the proof and crossing the threshhold, as it were, gives you a variance from normal redistricting practices, but it may not give you the license to pick up that variance and take it to another part of the state and draw a district which would not make that proof, for political or racial reasons. You would sort of have to dance with the girl that brung you in that case.

Q. Well, I would ask you to respond to my question, it's getting late in the day. My question now is, it is the usual practice then, if the court finds a violation, to then turn it over to the districting authorities, in the state here, it would be the legislature, and with the instruction that they must then comply with the law; is that not right?

A. I've seen sometimes where the court has directed the legislature. I have seen some situations where the court has drawn the plan themselves. I've seen some situations where the court has drawn a plan said, if you did, the legislature don't act, here's what you get. That's a good ploy, so I think, yes, sometimes.

Q. So the compact Gingles requirement, geographically [168] compact Gingles requirement that's shown is not necessarily the plan that ends up as being adopted in response to a finding of a violation?

Mr. Everett: Objection.

Q. Is that not true?

Judge Phillips: Overruled.

A. I don't think that the compact district that may have been presented in court would end up being the final district, but again, I don't think that you pick up that redistricting proof and move it to an entirely different portion of the state with entirely different circumstances and say it was required — that district was required by Section 2.

* * * *

[173] Q. Dr. Hofeller, you have testified here today with some passion about the need for compactness in districting. I would like to ask you whether you have not, in the 1990's election cycle, appeared in a federal court and given the following testimony: I believe the compactness should fall before the criteria to create districts for minorities where they have an equal opportunity to elect candidates of their choice.

[174] A. I know that statement, yes.

Q. That was in the Florida Degrand case?

A. Yes.

Q. In that case, you had proposed some — drawn some districts and testified about the districts before the retired federal district court judge who was serving as the referee in that case?

A. Yes. Again, I also testified in that case that if you could draw less compact district rather than a more compact district, that it would be desirable, and also it should be noted that the Florida situation is somewhat different from the situation in North Carolina where the only way you could ever hope to draw such a district would be by lack of compactness.

I would also like to clarify one thing. You are saying I'm testifying with passion about compactness. Again, I think we have to separate the issue of geographic compactness in terms of a Section 5 threshhold from district compactness on the boundary of the district.

Q. Well, you also testified and you put some charts in about all these various mathematical measures of compactness; have you not, in this case?

A. Yes.

Q. In that Florida case you were asked about some compactness measures which indicated a district or so that [175] you have drawn there, scored badly on a compactness measure; isn't that right?

A. That's true.

Q. Good.

A. Again, that was the only district that could be drawn.

Q. Did you not testify in that case, "I don't think that measurements and compactness are a reason for denying minorities their rights to have districts where they have an opportunity to elect candidates they want of choice"?

A. Yes.

[189] Q. On cross-examination yesterday, there were several questions about the residence, your knowledge of the residence of Democratic incumbents at the time you drew the Shaw II plan.

At the time, did you have knowledge or information about the residence of those Democratic incumbents?

A. I did not.

Q. Why didn't you have that information?

A. I just didn't have the information in my system and it wasn't available to me at that time.

Q. So when Shaw III was drawn with, I believe you testified three Democratic incumbents in one district, that was not intentional?

A. Yes. That's why I redrew it. There was never any intention to out-district anybody.

Q. Dr. Hofeller, I believe, in response to one question on cross-examination yesterday, you stated that if you could draw a less compact district rather than a more compact district that would be desirable; was that a misstatement?

A. Yes. I apologize for that statement. I always said [190] more compact districts are desirable in favor of less compact districts.

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TESTIMONY OF DR. TIMOTHY G. O'ROURKE

March 29, 1994

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[216] Q. Dr. O'Rourke, do you, as a political scientist, have any opinion as to whether any relationship exists between this trend and the availability of computer technology?

A. I think the two are directly related. It's a function of the availability of the greater number of building blocks. That is to say, in an earlier time, the building blocks were larger, typically counties or sub-county regions, but now the building blocks, as Dr. Hofeller pointed out, as we heard again this morning, are census blocks. And to draw a kind of stark contrast, there are 100 counties in North Carolina; we learned this morning there are about 225,000 census blocks, so we have more units of analysis, and the computer technology enables us to utilize the greater number of units of analysis to build a much — it essentially creates [217] opportunities to draw districts in infinitely greater number of ways. So it's the change in the census count along with the change in the computer technology.

Q: Doctor, do the measures of compactness, the mathematical measures, provide an insight into the nature of purpose of the redistricting plan? That is, is it your opinion that, as a political scientist, do they provide any insight?

A. I would say not necessarily. I think there are many reasons for creating districts that are not compact. In some circumstances, non-compact districts will be created by virtue of insurmountability or unavoidable natural barriers. I used to live in Virginia and it was a problem what to do with the counties on the eastern shore; sometimes the lack of compactness is a product of necessity. It surely can be a product of other kinds of factors.

If I could, I did want to finish, add a comment on the Pildes and Niemi study.

Q. Yes, sir.

A. As part of this study, they ranked the 28 least compact congressional districts in the United States. And four of the 28 districts were from North Carolina. The 1st, 5th, 7th and 12th districts. And in fact, PILDES and Niemi said that if — if you add together the two [218] compactness measures of perimeter and dispersion that the North Carolina 12th Congressional District turns out to be in their words "the worst in the nation."

Q. Was there any other way in which North Carolina led the nation? That is, were there any other states that had as many of these 28 as North Carolina had?

A. Yes. Texas had — I can count them if it's important for the record. Texas had six districts on the list. Looks like New York had five or six.

* * * *

[233] Q. Do you believe, from the materials that you were — you did formulate an opinion as to why the legislature drew the districts as it did?

Judge Phillips: The question is on the basis of the information that's been available to him?

Mr. Everett: That's correct, your honor.

Judge Phillips: Whether he has an opinion on that?

Mr. Everett: Yes, sir.

Judge Phillips: He can express that opinion.

The Witness: I think one reason is clear, that one reason for drawing the districts was to comply with the demand made by the Justice Department that the State [234] fashioned two majority minority — or the districts, certainly the 1st and 12th District satisfy that requirement. So certainly race is a principal factor accounting for the creation of these districts. Certainly, looking at individual lines there, may be other factors at work.

By Mr. Everett:

Q. Dr. O'Rourke, consistent with — could North Carolina, in your opinion, have drawn more compact majority minority districts?

A. Yes.

Q. And —

A. But let me elaborate on that.

Q. Sure.

A. The term "majority minority" district is subject to debate. In other words, we can ask what is a majority minority district. There are several different levels at which this could be asked. For example, would a district that combined African-Americans and Native Americans so the two groups together comprise a majority of the voting age population or registered voters of such a district, is that what we mean by a majority minority district. Would we mean, alternatively, that we would only count as a majority minority or the district, one in which African-American voters standing alone were [the] majority of [235] voters, would that be such a district. So that would be a factor.

To the extent that we allow the combination of two minority groups to form a majority, that would make it easier to draw a more compact district. Another factor that we would have to take into account would, in effect, change the definition, or at least change the ground for defining a majority minority district from one in which members of a racial minority were, in effect, a majority of the elected, to the sort of district in which a minority candidate might win.

For instance, it's very clear if we looked at Mecklenburg County, for example, combined it with Lincoln County, we come close to a situation in which we have a district with almost the ideal population. That would not be remotely close to a district that had an African-American majority in the voting age population, but it is a district that Harvey Gantt carried in the 1990 Senate race. So, if we looked at a minority district in those terms, as one in which a minority candidate could carry, there again, we could draw very compact districts.

What I'm suggesting to you as a political scientist that the ability to draw compact districts that are, let's say hospitable to minority candidates depend very much on the kind of criteria that we employ. As the kind of [236] criteria that we use are rigidified so that we say the district must have an African-American majority of a certain percent, then the ability to create a compact district is minimized. As you relax that standard, then compactness becomes more achievable.

Q. With respect to the 1st District, do you have an opinion, as a political scientist, and from the data that you have studied, as to the probability of election of an African-American from that district in the 1992 election in terms of the conditions that existed at the time the district was formulated?

A. Well, in all honesty, it's easy to say that it was. I mean, after the fact, to make a prediction. I don't believe that I could have made a sound prediction at the point in time in which the legislature was drafted or planned. But in terms of drafting a plan that led to the election of an African-American candidate, the legislature did that. As I said, there's a balancing that in a — there's a balancing that could go on in the absence of the intrusion of legal rules, and I'm saying as a political scientist, one might give compactness a greater standing if the process were not wholly driven by, let's say,

standards imposed by the Justice Department or expectations about what the law requires.

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[239] Q. I asked if assuming the state had a compelling interest in forming two majority black districts, do you, in your capacity as political scientist, have an opinion as to whether the 1st and 12th District were narrowly tailored?

A. Yes, I have an opinion. I would say they are not narrowly tailored.

Q. What is the basis for that opinion?

A. The basis of the opinion would be two-fold. I mean, I think this is not a bona fide congressional district plan because of the use of the double cross-over. The [240] checkerboard theory of congressional districting, in my view as a political scientist, that's simply off the scale of options. Setting that very large objection aside, I think the problem is that these districts are simply not does is, they cross through — at least 12th goes through several metropolitan areas. These are not the sorts of districts that one would fashion to promote the principle of cognizability.

Q. And does that principle of cognizability relate in turn to fair representation which is the beginning of our — your direct examination?

A. The damage is two-fold, these are not ideal districts, in effect, for African-American candidates to run in, and the consequences are felt in the adjacent districts in terms of the impact these districts have on those districts that must surround them, or, in effect, cross over them in the case of the 1st and 3rd.

Q. Then would such a plan have an effect in the creation of districts — 1st and 12th have an effect on all

12 districts in the state of North Carolina, all the voters in those districts?

A. Well, you know I honestly don't know the answer to that. There's some ripple effect, but I can't say for certainty the fact the existence of the 1st and 12th inevitably have some effect on every other congressional [241] district.

* * * *

[257] Dr. O'Rourke, do you have plaintiff's Exhibit 202 in [258] front of you?

A. Would you identify that exhibit, please?

Q. That's the article to which you referred, I believe, on direct examination?

A. I do not.

Q. Professor O'Rourke, this one is not numbered, but I would ask you if that's your article to which you referred on direct examination?

A. Yes, it is a paper.

Q. And is this a paper you delivered on March 10 and 12, 1994 to the Western Political Science Association?

A. Yes.

Q. And you are the author of the paper?

A. Yes.

Q. And does this paper — is it fair to say this paper forms the basis for the testimony you have given here today or much of it?

A. Much if it, yes, sir.

Q. In that particular paper, do you address the question of whether or not shape of districts or division of counties affects voter turn-out? And I would refer you to page 21 of that paper.

A. There are — I think the paper looks at two issues. One is how the shape of districts affects turn-out as a percentage of voting age population in congressional [259] districts to the extent that counties are mentioned. The figure with respect to counties relates to roll off, which is the drop in percentage turn-out from presidential level to the congressional level. In other words, what number of voters who participate in the presidential race do not vote at the congressional level.

Q. And in your opinion as a political scientist, Dr. O'Rourke, does the level of turn-out participation in a congressional election to some degree indicate whether the plan provides for fair and effective representation?

A. Certainly would be a measure, and I would want to see the exact measure to make a decision about whether it's appropriate for the use to which it is put.

Q. And in the paper, Exhibit 202, do you report to your colleagues at the Western Political Science Association, that ballot roll off was the sixth highest in Mecklenburg County among the State's counties?

A. Right. That number, I believe, should be the fifth; that's one of the corrections to which Mr. Everett referred.

Q. And in your paper, your colleagues at the Western Political Science meeting, do you report Mecklenburg County is divided among three districts?

A. That's what it says; that should be two.

Q. And I take it by that statement you mean to imply the [260] division of counties somehow causes low voter turn-out, causes roll off.

A. That was a notion that I had but as I looked at that I was not persuaded that the division, per se, of counties connected to roll off.

Q. Have you come to the conclusion that, in fact, there's absolutely no relationship between divided counties and roll off in North Carolina?

A. I have reached no conclusion.

Q. Okay. Let me help you with that. I will show you exhibit which I have marked as Exhibit 437. And I would ask you whether Exhibit 437 is the data upon which you reported to your colleagues at the Western Political Science meeting that the roll off in Mecklenburg County split among three counties was the fifth highest in the state?

A. Yes.

Q. Did you report to your colleagues at the Western Political Science Association meeting that Cumberland County is also split into three districts?

A. No, sir. That's — in part, that's the reason I did not so report. Today I'm not persuaded that splits among counties, per se, is an important variable.

Q. Does Exhibit 437 demonstrate that the roll off in Cumberland County, which is split into three districts, [261] was the third lowest in the state?

A. It would illustrate it to be the fourth lowest.

Q. Does your Exhibit 437 — in fact, more people voted in congressional elections in Cumberland County than voted in the presidential election?

A. Yes.

Q. Does your Exhibit 437 also indicate that there are five other counties split into three districts? And if I can perhaps help you with that, Dr. O'Rourke, looking at the first page of Exhibit 437, near the bottom, you see Rowan County was split into three districts?

A. Yes.

Q. Rowan County then would have the — excuse me — approximately 97 percent of the people in Rowan County who voted for president also voted in the congressional election; is that correct?

A. Yes.

Q. And Rowan County ranks 48th in roll off?

A. I would have to count down to it.

Q. I would advise you that maybe it will assist you, 25 counties listed — excuse me, 50 counties listed on page 1 and 50 on page 2 of Exhibit 437.

If that's true, what would be Rowan County's rank?

A. That would be 48.

Q. And turning to page 2, is it — does it indicate that [262] Iredell County is split into three districts and would be ranked fifth?

A. Yes, sir.

Q. That Forsyth County is split into three districts and is ranked 61st?

A. Yes.

Q. That Guilford County is ranked — split into three counties and ranked 72nd?

A. I assume your counting is correct.

Q. Pender County is split into three districts, and ranked 74?

A. Yes, sir.

Q. And once again, Cumberland County is split into three and ranked 97th. Now, I'd like to take you through one more step in this exhibit, Dr. O'Rourke. Look at the ten counties with the most roll off between the congressional and presidential elections. If I'm

correct, Person, Scotland, Bladen, Chowan, Mecklenburg, Martin, Pope, Tyrrell, Madison and Perquimans?

A. Yes.

Q. How many of those counties are split among three districts; only Mecklenburg?

A. Yes.

Q. How many of those counties are split in two districts?

[263] A. Three.

Q. And the remaining counties are within a single district?

A. (Nodding.)

Q. Now, look at the bottom, the second page. The ten counties with the least roll off between presidential and congressional elections. They would be Richmond, McDowell, Davidson, Cumberland, Robeson, Cabarrus, Wilkes, Columbus, Stokes and Caldwell?

A. Yes.

Q. How many of those counties were divided among three districts?

A. One.

Q. How many of those counties are divided among two districts?

A. Six.

Q. Twice as many counties divided among two counties?

A. Yes.

Q. Is it true, among all those ten counties we just listed, that in each case more people voted in the congressional election than the presidential election?

A. Yes.

Q. Now, based upon Exhibit 437, wouldn't you have to conclude, Dr. O'Rourke, that there's absolutely no relationship between dividing counties and voters [264] participating in congressional elections?

A. Yes. But I think a word of explanation is in order. It appeared to me, based on the review of the data not unlike the one you have just walked us through, that the division of counties per se is less important than the division of geographic communities, as I have previously described it. And, in fact, there was a relationship between the compactness measures of Pedlis and Niemi and both turn-out as a percentage of VAP of cross congressional districts and roll off.

Q. Let's talk about that a little bit. You report that, too, at page 21 of Exhibit 202, don't you?

A. Yes.

Q. You indicated on page 202 and represented to your colleagues, I assume, that the correlation between the Niemi perimeter score and congressional vote in the 12 districts is 6.78?

A. Yes.

Q. Which suggests some correlation?

A. Yes.

Q. Did you report to them that you also examined the relationship between the dispersion score and congressional vote and found no significant relationship?

A. No; there was a relationship, but not significant.

Q. And when you — let me ask the question this way. [265] You testified at your deposition that education is the most important determinant of voter turn-out; do you recall that?

A. On an individual level.

Q. Did you take into account education levels when comparing Niemi perimeter scores with turn-out?

A. No.

Q. You testified at your deposition that income is an important determinant of turn-out; do you recall that?

A. Yes.

Q. Did you take income into account?

A. No.

Q. You testified at your deposition that age is an important determinant of turn-out; did you take that into account?

A. No.

Q. You testified at your deposition that the competitiveness of the race is an important determinant; did you take that into account?

A. No. That, in effect, could be a product of the compactness, or lack thereof, of the districts.

Q. As a political scientist, Doctor, the fact that there is a positive correlation between one of Niemi's perimeter scores and turn-out, given the lack of analysis of these other important factors, provides no basis for you to [266] conclude reasonably that there's a relationship between geographic compactness and turn-out.

A. I disagree. There are other factors.

Q. Have you examined any of those other factors?

A. I mentioned —

Mr. Everett: If he would be allowed to complete his answer.

Q. I'm sorry. Would you like to complete your answer?

A. There were other factors I mentioned on direct, including Niemi's 1986 study, the results of the poll and so these are pieces that are suggested and point in the same direction.

Q. In performing this perimeter score comparison, you did not take into account any of the factors you testified at your deposition are important determinants of turn-out, did you? Yes or no, Dr. O'Rourke?

A. No. With respect to turn-out as percentage of VAP, they would be relevant. With respect to roll off, it's not clear that they would be.

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TESTIMONY OF GERRY COHEN

March 29, 30 & 31, 1994

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[289] A. Yes, I saw states that had plans in the 1980's where they used census tracts, which appeared to me to be artificial in the sense they followed no political or election boundaries or county boundaries, and, in fact, divided precincts all over everywhere, and were ununderstandable to me in the terms of how campaigning or election administration would go on in these areas.

I recommended to the legislative leadership that we participate in a program authorized by Congress to obtain precinct boundaries in a much greater part of the state.

Q. Could you explain what this program — first, did the State — or leadership agree the State should participate in this program?

A. Yes, in early 1985, after the most of the litigation in the Gingles case was over, staff recommended to the legislative leadership that we participate in a program known as Public Law 94171. Under that public law, Congress required the Census Bureau to give states census populations based on precincts, the State participated in a joint program and complied with certain Census Bureau criteria, and legislation was based passed in 1985 to provide that the program would take place for all counties with a population of 55,000 or over, and other counties that wished to volunteer.

Q. Do you know why the 55,000 population number was [290] used?

A. Because that was the population of the smallest county in the court order in Gingles, that being Edgecombe, whose population was 56,000.

Q. Okay. If you could explain for the court a little bit about the building blocks that the census used and the State used by participating.

A. The building blocks that were used in developing the census geography for the 1990 census?

Q. Yes.

A. Well, the basic building block or census blocks, which consist of a combination of visible features, such as streets, roads, railroads, power lines, waterways, along with some political features, such as township, municipal and county boundaries as of January 1st, 1990.

Q. And —

Judge Phillips: Could I get one point of clarification that's bothered me throughout this, only remotely concerned with anything. To the extent the census block boundary is not limited by a visible boundary, a street, a highway, stream, what did you say it is bounded by?

The Witness: It can only be a visible feature, there are some visible features they won't use, roads have to be a certain width, for example; but the only features [291] that are not visible that may be used were county, township and municipal boundaries as they existed on January 1st, 1990.

Judge Phillips: So it's either visible boundaries or ascertainable jurisdictional boundaries.

The Witness: Yes, your Honor.

Judge Phillips: To which one can refer for location on the ground, if one were disposed to do it, of a particular census block?

The Witness: Yes, all counties, townships and municipal boundaries have descriptions that are available in some public record at some point in time, yes, sir.

By Ms. Smiley:

Q. And you said that the jurisdictional boundaries used were as of what date?

A. For counties, townships and municipalities, January 1, 1990.

Q. If counties changed any of those lines, what happens to census block?

A. The Census Bureau does annual surveys to keep themselves ready for the census. The survey of January 1st, 1990, was to determine — the census blocks had already been drawn with the visible features in the period '86 to '89. Then after the survey was returned on January 1st, 1990, they added the municipal boundaries and — to [292] finalize those census blocks at that point. Any changes after January 1st, 1990, are not reflected in the 1990 census.

Q. So even today, your census blocks might not — say, a city that has done annexing might not meet the lines?

A. At this point some census boundaries might be former municipal boundaries, but they would be ascertainable by the record in effect on January 1st, 1990.

* * * *

Q. What's the relationship now of the precinct lines and census blocks?

[293] A. As a result of the '85 legislation, the General Assembly required those 48 counties to change their precinct boundaries to follow visible features or municipal or township lines so that when we participated in the Public Law 94171 program, we would be able to participate in those 48 counties in a county-wide basis and have accurate precinct population totals for the 48 counties.

Q. Census blocks would not go across county lines?

A. That's correct. All block numbering is unique within each county, and then within each county, within each census tract.

Q. And is a precinct made up of a number of census blocks?

A. Yes, a precinct is a collection of many dozens or hundreds of census blocks, yes.

Q. Now, talking about the 48 counties where the precinct lines had been conformed with the census.

A. Yes.

Q. Are any of those census blocks divided by the Census Bureau?

A. No. As I explained, that in putting down those city limit lines, they divided census blocks just prior to taking the census. In those 48 counties, the precincts lines followed only census block boundaries, and thus do [294] not divide any census blocks.

Q. What about the other counties? First, I believe there's a group of 21 counties?

A. At the time — the 48 counties encompassed about 80 percent of the state's population. At the time that legislation was passed in '85, I stated in committee that — in the legislative committee, that we would, as we went into the 1990 census; if that didn't appear to be adequate coverage, we would attempt, in building the data base, to assemble census blocks up to precincts in as many additional counties as would appear to be necessary to adopt plans.

So, as we went into 1991, it appeared that there was a lot more interest in developing minority districts than we had envisioned back in 1985. And we went and built these census blocks up into precincts in 21 additional counties as we had time and as that was manageable. And that resulted in the totality of our data base.

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[295] Q. Did adding the precincts mean you had to divide census blocks?

A. In these 21 counties, there were a number of precinct boundaries that didn't follow census features. Those precinct boundaries have been defined by the county boards of elections. In those cases, in order to put that geography on the census data base, a number of blocks, probably about 100, were divided in putting down the data base for the legislative computer system, yes.

Q. How did you go about dividing them?

A. As had been done in 1984 in Wake and Durham County, there were on-site housing counts made that particular census block, finding the precinct line and counting the number of housing units on each side and apportioning the population of that block accordingly. Although many of the blocks had no people in them.

Q. Now, you got your 48 counties participating and the legislative staff, working 21 counties, building up the precinct level?

A. Yes.

[296] Q. What about the remaining counties?

A. In the remaining counties, the basic building block below the county level was township, which was—geographical and political subdivision of North Carolina.

Q. Did township lines agree with census block lines?

A. Yes, because Census Bureau used township boundaries as census block boundaries under federal law.

Q. One additional piece of information you had put in the data base — what did you do with the old district lines as they related to the new census blocks?

A. Under Section 5 of the Voting Rights Act, one of the recommended requirements of making a preclearance submission was the 1990 census population of the previously existing districts. When we went to find out those boundaries, put them on the new system, in many cases the boundaries of the 1984 State House and State senate districts followed precinct boundaries which were city limits in 1984.

The cities made annexations so they were simply former city limit lines and the 1990 census did not have separate tabulations for those. So we went back with the old municipal corporate maps and many of those city limit lines were still shown on the census map, but they weren't block boundaries. They were shown as city limit lines as features on the maps. So we went back and had people make [297] individual housing counts on both sides of about 100 blocks in seven or eight counties to be able to make our Section 5 submissions. So those blocks were divided in our data base from the beginning.

• • • •

[297] Q. And do you know, in terms of the census blocks, that the legislative staff divided them. Do you know about how many census blocks you divided?

A. Are you talking about in the enacted plan or total?

Q. No, total in your data base.

A. Probably about 250 or so.

Q. Okay. And how many census blocks, approximately, are [298] there in the data base?

A. I believe about 229,000, give or take.

• • • •

[308] Q. All Right. In the redistricting process, whose instructions did you follow? There are 170 legislators. Whose instructions did you follow?

A. I was instructed to follow the instructions of certain designated members of the legislative leadership.

Q. And they were?

A. The Speaker, President Pro Tempore, the three co-chairs of the House Committee, the Chair of the Senate Committee and the Subcommittee Chairs, who were Representative Dan Blue, Senator Henson Barnes, Representatives Toby Fitch, Ed Bohn and Sam Hunt, Senator Dennis Winner, Senator Joe Johnson and Senator Russell Walker.

Q. And collectively, when you talk about the leadership, is that who you are referring to?

A. That was eight people, yes.

* * * *

[312] Q. What was the purpose of the State's submission?

A. Under Section 5 of the Voting Rights Act, the state bears the burden of proof to show the Department of Justice that the factors required under Section 5 have been satisfied. The regulations set out certain criteria and certain things that the State needs to show or may show. And we organized our submission based on the sections and subsections of those regulations to make sure that we had met our burden of proof.

Q. And what is the emphasis of the submission?

A. Race. Because that's the emphasis of Section 5 of the Voting Rights Act.

* * * *

[314] A. The Justice Department had received a number of responses, comments, to our submittal, which are permitted under the Section 5 regulations, the largest of which was made by the American Civil Liberties

Union. This was reply comments that I had drafted to those submissions — to those comments. The Justice Department had invited the State to reply to those comments.

Q. I believe on the front of that exhibit it's — on whose behalf does it say it was prepared?

A. Says on Stipulation Exhibit 25, this memorandum is submitted on behalf of Representative Toby Fitch, Co-Chair of the House Redistricting Committee; Senator Dennis Winner, Chair of the Senate Redistricting Committee; and House Speaker Daniel T. Blue.

Q. Who actually prepared that document?

A. I did.

Q. Did you do that in the course of your duties?

A. Yes. It states on the memorandum, to United States Department of Justice, from Gerry F. Cohen, Director of Legislative Drafting. One of my duties was to reply to the submissions and reply to the comments of the ACLU.

Q. Now, did you, in fact, take that to Speaker Blue or Representative Fitch or Dennis Winner to read before you submitted that to the Department of Justice?

A. Not to my recollection.

[315] Q. Okay. Now, in those documents, what were you attempting to do?

A. I was attempting to refute the comments that had been made by those groups who had opposed our Section 5 preclearance submission.

Q. And can you put those comments in context?

A. Yes. The State was attempting to show, at that point, that its plan with one majority black district satis-

fied the requirements of Section 5 of the Voting Rights Act, which considerations were made on race.

Q. Did you comment on all alternatives that were before the General Assembly at that time that the General Assembly had not acted on?

A. Yes, I did.

Q. Could you put those comments in context?

A. Yes. At the time those comments were made, they were made in the context of plans that we had had before us at that point in time. There were several plans that had two majority black, or two majority minority districts, none of which resembled, in my opinion, that enacted in the General Assembly in 1992.

Q. In those submissions were you critical of the shapes of some of those plans?

A. Yes.

• • • •

[316] Q. Let me see if I can break this down a little easier. Did you — did you criticize the alternative plans before the General Assembly in your submission?

A. Yes.

Q. And beyond the shapes of the districts, are there other reasons for criticizing those districts?

A. That they failed to have commonalities of interest.

Q. Okay. Now, in looking at those alternatives, and looking at the shapes of the minority districts in the enacted plan, what, in your mind, is the difference between the plans that were rejected and the plan that was eventually adopted?

A. The fact that the plans that were enacted were made so with the — to enact two districts, one of which was [317] urban in nature and one of which was rural in

nature, which was not seen in any of the plans we previously analyzed, and which I commented on in my response to the ACLU comments.

Q. In front of you, I believe, there's another exhibit, Stipulation Exhibit 24?

A. Yes, I have that here.

Q. Okay. And could you identify what that is?

A. That is a response that I made to the Justice Department on November 3, 1991, in response to their request for additional information, which they were entitled to make, and did so, under Section 5.

Q. All right. And what does that — specifically, what is that memo about?

A. Says, this memorandum deals with my instructions, notes or memorandum. I received no written instructions, all of my instructions were oral.

And I summarized in there a lot of the instructions that I had received in even enacting the 1991 plan, in the preparation of the 1991 plan to the extent I had responsibility for it.

Q. Here we're talking about Chapter 601, the plan that was rejected?

A. Yes.

• • • •

[318] The Witness: It was Stipulation Exhibit 24.

Q. And could you identify Stipulation Exhibit 9?

A. Stipulation Exhibit 9 is the redistricting criteria for congressional seats adopted by the responsible legislative committees.

Q. And Dr. Hofeller commented on each of these criteria in his testimony. And could you explain for the court these criteria?

A. Yes. Criteria 1 states the congressional districts shall have population as nearly equal in population as practicable, thus either 552386 or 552387; that was the first criteria.

Q. What was the second?

A. Criteria 2, in accordance with the Voting Rights Act, the 14th and 15th Amendments, the voting rights of racial minorities shall not abridged or denied with the formation of congressional districts.

Number 3, as in accordance with 2 U.S.C. 2C, that the districts shall be single member districts and consist of contiguous territory.

Number 4, it is desirable to retain the integrity of [319] precincts. For the purpose of this criterion, a precinct shall mean the voting tabulation districts as demarcated in our redistricting system as of May 1, 1991.

Does not apply in counties where voting tabulation districts are not demarcated in the General Assembly's automated redistricting database on that day.

Q. Gerry, before you continue, could you explain what the point of that criteria is?

A. The point of that criteria was that precinct populations were available in those — in 69 counties, and the integrity of the precincts, using precincts as building blocks would aid voters, candidates, and election officials in actually conducting or voting and campaigning in congressional elections. So to the extent possible in conjunction with the other criteria, it was desirable to use whole precincts.

In the other 31 counties, where they were — precinct boundaries were not in the legislative computer system, we didn't have in front of us, on the computer screen, precinct boundaries. And thus, the criteria didn't suggest, encourage retaining their integrity.

Q. What was the last criteria?

A. Census blocks shall not be divided, except to the extent they were divided in the automated redistricting system database for precinct boundaries, or to show [320] previous districts.

Q. Now, on that last criteria, does that relate to what you were describing to the court, about the building up of information of divided census blocks?

A. Yes. I described to the court previously some census blocks had been divided to show precinct boundaries or to show the boundaries of prior State House and Senate districts which seemed to be required under our Section 5 duties to receive preclearance.

Q. I notice compactness is not a criteria on this.

A. That's correct.

Q. And do you have any views on compactness of the criteria, do you have any views?

Mr. Farr: Objection. I would like clarification as to whether it's his personal views or he's speaking —

Judge Phillips: I think the question could be focused a little bit to make it more helpful.

Q. What was your role with legislature — are you an attorney?

A. Yes.

Q. Did you give them legal advice?

A. Yes.

Q. Were you involved in the development of the criteria?

A. Yes.

[321] Q. And was there discussion about compactness?

A. In the development process?

Q. Yes.

A. Yes.

Q. And in your view, why was compactness not included?

A. Because with the other, especially the first four criteria, to carry those out, with equal population creating majority minority districts, keeping single member districts, having them contiguous, it's very difficult to have districts that were geographically compact. Instead — let me stop at that point answering that question.

* * * *

[331] Q. Did you attend any of the public hearings?

A. I believe there was only one public hearing on the enactment of Chapter 7 in the legislative auditorium. I attended most of that hearing.

Q. Were there any public comments dealing with communities of interest or urban and rural interests?

Mr. Farr: Objection.

Judge Phillips: Overruled.

Q. Yes, there were, there were several. The most notable of which was from Robert Hunter, an attorney from Greensboro, who said one thing he noted in the Peeler Plan was it didn't treat all urban communities alike. He [332] thought all urban communities in the Piedmont crescent area should be included. He mentioned specifically that Forsyth County was left out, and urged the legislature to add Winston-Salem to be the 12th Congressional District.

* * * *

[333] Q. Based on that public hearing, what was your view of what needed to be done to the Peeler Plan?

A. Well, that comment, I think, struck me to be remembered vividly because I think it really drove a lot of what happened in the period shortly thereafter. Because that's at the point where we began to look at the urban and rural nature of the district, really because of those comments at the public hearing. We looked back at the plans and looked at how much was urban and rural in the proposed 1st and 12th districts.

There's a report that can be run on the computer system called place population. Place is the census word for city limits. You can run a report for each congressional district showing the population of each district that's within each city limit.

If you will look at Exhibit — if I can bring to the court's attention Exhibits 406 and 407 of the defendants, Exhibit 406 lists North Carolina's municipal population rank ordered by population, that's prepared by the State data center. Exhibit 407 is a similar publication done directly by the Census Bureau in alphabetical order by city, not rank ordered. It has July 1990 estimates, but basically the same as April 1990.

Q. Did you use those documents?

[334] A. Yes.

Q. And how did you use them?

A. In beginning our analysis after the public hearing, I ran these reports to look at the urban/rural nature of the district as we were attempting to analyze Mr. Hunter's comments about having an urban district. I looked at the populations of the cities in rank order and looked at what I thought, based on my context as having worked in the General Assembly, what members of the legislature would consider urban in a North Carolina context.

I looked at the top 25 cities, which cut off at about 20,000 in Havelock, right between the population of Havelock and Lumberton, was about 20,000. We looked

at that as the criteria. I analyzed these based on that criteria, populations of 20,000 or over, and looked at what urban areas were missing from the 12th District. And that was Winston-Salem and Gastonia.

And over the course of the next several days, I reworked the Peeler plan to add much of Winston-Salem and Gastonia, primarily the majority black precincts, into the 12th District.

Q. Was the leadership aware that you were using this 20,000 cut off?

Mr. Farr: Objection.

Judge Phillips: Overruled.

[335] A. Yes.

Judge Vorhees: Did you say 20 or 25?

Witness: The top 25 incorporated places, which were the places where with a population of 20,000 or over.

* * * *

[341] Q. Mr. Cohen, you testified yesterday about the genesis of the Peeler plan put on the legislative computer system. Are Maps 418 and 422 maps of the Peeler plan?

A. Yes, those two maps are maps of the Peeler plan.

Q. All right. And does the Peeler plan contain two majority minority districts?

A. Yes, it does.

Q. Where are they located, generally?

A. One of them is located, beginning in Charlotte, up [342] through Statesville, east through Salisbury, and on through Greensboro to Durham, and then several counties north of Durham along the Virginia border.

The second starts in Warren County, runs through much of the eastern part of the state, down to New Bern, Wilmington and Fayetteville.

Q. All right. Without repeating too much of yesterday's testimony, could you indicate, briefly, what were the first major changes you made to the Peeler plan?

A. The first two major changes that I made in the Peeler plan was adding a large portion of Winston-Salem, as I mentioned yesterday, along the goal of adding another urban area as requested by Mr. Robert Hunter, and also making the district more urban.

At the same time, portions of four counties along the Virginia border were removed; Caswell, Person, Granville and Vance.

Q. You explained yesterday using Exhibits 406 and 407, your reference to population?

A. Yes. At that point, we ran a report looking at the population of which cities were in that district, and looked at those tables I was referring to, just before adjournment of the court yesterday, as to which cities were sized to be considered urban in North Carolina context, the largest 25 incorporated places.

[343] And I noticed that approximately 80 percent of the 12th District was in communities, incorporated places of 20,000 or over; whereas, about 80 percent of the population of the 1st District was in places of 20,000 or under. Seemed to be co-existent of a suggestion of public hearing the 12th District be urban in nature.

Q. When you used the population statistics in Exhibits 406 and 407, were you just looking at the black population statistics?

A. No, I wasn't looking at them at all. I was looking at the report of the total population of the 12th and 1st

District — that were in the 1st and 12th Districts, not at the racial classification of any of the populations.

Q. All right. Did this urban/rural concept guide your efforts, your later efforts on the plan?

Mr. Farr: Objection.

Judge Phillips: Overruled.

A. Yes, it was a central part of the plans for finishing the redistricting plan from that point forward.

Q. And did you discuss this urban/rural concept with the leadership?

A. Yes. After noticing it myself, I did report that finding in discussion with the leadership.

Q. In your own view, are there similarities or commonalities of interest in the urban areas of the 12th?

[344] Mr. Farr: Objection.

Judge Phillips: Overruled.

A. Yes. From my knowledge and experience, both from being Director of Bill Drafting, and also from studies that I worked on in 1982 and 1983. I have been staff counsel to a legislative study commission on the North Carolina railroad, where I was required, and did, spend, several weeks traveling along the railroad corridor from Charlotte through Durham, and then onto Goldsboro and Morehead City. And made a lot of observations at that point about the nature of a lot of these counties in this area, especially the urban counties. And I felt then, as I do now, that there are major similarities between the communities, the urban communities and Piedmont urban crescent, all of which are from Durham west are in the 12th District.

Q. Do you have Exhibit 410?

A. Yes, I do.

Q. What is that?

A. Exhibit 410?

Judge Phillips: Could you tell us where that is?

Ms. Smiley: Yes, sir, I'm sorry. It's in a bound defendant's exhibit.

Judge Phillips: Is it an exhibit tab?

[345] Ms. Smiley: Yes, Tab 10. All our numbers are 400's, we didn't' have the 400 labels.

The Witness: This is a report on the North Carolina railroad written by the North Carolina Department of Transportation in 1976 as required by the General Assembly.

By Ms. Smiley:

Q. Does it contain a map?

A. Yes, it does. That map is at the end. There are two maps at the end of Exhibit 410; one of the North Carolina railroad and one of other railroads nearby.

Q. Gerry, are you intimately familiar with that railroad track?

Mr. Farr: Objection.

Judge Phillips: Overruled.

A. Yes.

Q. Could you briefly tell the court?

A. Well, from my knowledge from reading that report, and under the research I did at the time reading North Carolina history text, that the major urban —

Q. No, Gerry, excuse me. I just want them to know your personal experience.

A. Yes, I'm familiar with the communities around the railroad and along the railroad itself.

Q. Why is that?

[346] A. As I explained, in 1982 I spent several weeks studying the railroad corridor, location of the railroad, in the communities nearby.

Q. Did you walk along those tracks?

A. For probably a number of miles of it, yes, and I drove the remainder.

Q. Would you look at the 1st District. From your experience in the legislature, are there common interests in the 1st District?

A. Yes. As I discussed yesterday, there are some exhibits here in that same volume, Tab 9.

Exhibit 409 is a map resulting from legislative enactment creating a depressed counties jobs tax credit where the legislature, back in 1986 or '87 enacted a formula to target jobs credits based on — I believe the factors were poverty, unemployment.

If you look at Exhibit 409 up in 1992, for instance, that targeted credit, you see that many of the counties in the 1st District, the map of the counties in the northeast and southeast are, in fact, the counties of the 1st District. That as the legislature looked at these common interests, there's a commonality among those counties: rural, poverty, high levels of unemployment, poor housing.

* * * *

[347] Q. All right. Gerry — Mr. Cohen, as you worked on redistricting in the '90's, were you familiar with the existing districts in the 1980's of the congressional districts?

A. Yes, I was familiar with them.

Q. Did you know where the incumbents lived?

A. Yes, I do. And did.

Q. And did you give any consideration to where the incumbents lived or what might be called the core of their districts?

A. Yes. One of the factors used in my drawing of the plan was to have each incumbent member of Congress be in a separate district from each other, no pairing. In the second ones, to the extent possible, while creating two [348] minority districts and keeping them urban and rural, also to preserve the core of existing districts.

Q. And did you use the same district numbers for incumbents?

A. Yes. The district numbers in Chapter 7 are the same district numbers that each incumbent Congressman had in the prior decade, with the exception, of course, of the 12th District, which was an open seat.

Q. There's been some discussion of double cross-overs. In your view, what was the purpose of using double cross-overs?

A. The purpose of using double cross-overs was after — at the same time the districts were being constructed to create two majority black districts, one was urban and one was rural, in order to not pair incumbents. The 3rd District has a cross-over point where some of the district is contiguous with some to the east and some to the west of the corridor of the 1st District, shown in red of the upper map there. The 3rd District is in yellow.

Judge Phillips: What's that exhibit no. to which you are referring?

The Witness: The top map number.

Judge Vorhees: You may step down.

The Witness: Thank you, your Honor.

Corresponds to Map One Exhibit 301. The 3rd [349] District is both to the east and west of the path of the 1st District. It crosses over at that point, largely so that

Congressman Martin Lancaster, Tim Valentine of the — Lancaster of the 3rd District, Tim Valentine of the 2nd, Charlie Rose of the 7th, and Bill Hefner of the 8th would all be in separate districts, each of which maintained as much as possible of the areas of their previous districts so that they would have the greatest chance of being reelected, other things being equal.

By Ms. Smiley:

Q. All right. Going back to the Peeler plan, the Peeler map, I want to work our way through each of the districts, trying to give the court a flavor for some of the things that you were doing.

A. Yes.

Q. What did you do with the counties along the Virginia border?

A. Yes. As I explained from the Peeler plan, Caswell, Granville, Person and Vance County were removed from the 12th District. Caswell, Granville and Person, large parts of those counties were placed in the 5th District so as to assist the 5th District Congressman Steve Neal. And Vance County was placed in the 1st Congressional District, largely to assist Eva Clayton in a potential Democratic primary.

[350] Q. Okay. What happened initially to Winston-Salem and Forsyth County?

A. The initial change made between the Peeler plan and actual enactment of Chapter 7 had a larger portion of Winston-Salem in the 12th than in the enacted plan.

Q. All right. And what happened to Gastonia?

A. Well, as we continued to reflect on the public hearing comments and on the urban percentage, Gaston county is also part of the Piedmont urban crescent and was the only city of 20,000 or over in the urban Piedmont, urban crescent from Durham west that was not in the 12th District at that point.

It also had a heavy black concentration in Gastonia, so the area of Gastonia the — Gaston County that you can see on Exhibit 302 was added to the 12th District and a corresponding amount of population was removed from the 12th District from Forsyth County.

Q. And did that make the district more or less urban?

A. It was probably about a wash on balance.

• • • •

[351] Q. Could you tell the court what was in your mind, what you were doing when you made the narrow corridor between Charlotte and Gastonia?

A. Yes. The initial purpose of that change was twofold, was to add another urban area in the Piedmont crescent to the 12th Congressional District, as well as to assist Steve Neal as part of realigning the 5th District from east to west.

Q. The question here is limited to why you used a narrow corridor; what was in your mind?

A. One of the goals was to keep the 12th District in 80 percent or more of communities, and over in the area where it narrows down on Exhibit 302, in the west part of Charlotte, is where you leave the city limits of Charlotte, and it doesn't widen up again until the map is inside the city limits of Gastonia. So the area is left [352] very narrow between there so as to not include rural population, as to well not include any population as to substance.

Q. Is that true of some of the other corridors between the urban areas in the 12th?

Mr. Farr: Objection.

Judge Phillips: Overruled.

A. Yes. That is also true of the area in Davidson County from Thomasville to Winston-Salem.

Q. What did the Peeler plan do with maps and what was the effect of it?

A. Let me finish the answer to the previous question. It's also true, north of Charlotte, from Charlotte on towards Statesville. What the Peeler plan did to Kannapolis, comparing it with some of the plans we had seen the previous fall, the Balmer 8.1 plan and Optimum II-Zero, those two plans had the district going from Salisbury through Kannapolis to Charlotte.

I believe one of those two plans, my recollection is through the home precinct of Bill Hefner; in the Peeler plan, the district was moved west to Statesville so that Congressman Hefner would not have his home county divided and be left entirely out of the electoral district that he represented.

Q. Would you turn to Exhibit 42 in your map book?

[353] A. Yes.

Q. And could you tell the court what Exhibit 424 is?

A. Exhibit 424 is a map of North Burlington precincts, specifically, but basically the Burlington area.

Q. Is this a plot from the computer data base? Is this where you print a map from the computer screen?

A. This is a map from the computer data base with a heavy black line being a boundary between the 6th and 12th Districts in the enacted plan.

Q. What did you do in North Burlington? Can you use this map to explain to the court what you did?

A. Yes. In North Burlington precincts, you see to the right a little — looks like a little house right over says 113B and 113A. That house represents the residence of State Representative J. Fred Bowman, and the district

line in this case was drawn so that Mr. Bowen would be in the 6th District.

Q. Okay. Do you know why, or in your own mind, why?

A. Yes. The district was drawn that way because I was told that Representative Fred Bowen was to be in the 6th District, not in the 12th.

Q. Okay. Turning to the 1st District?

A. Yes, Ma'am.

Q. Let's talk about the 1st District and its composition a little bit. Are you familiar with what's called the Old [354] Black 2nd?

A. Yes. The Old Black 2nd.

Q. What is the Old Black 2nd?

A. The Old Black 2nd is the 2nd Congressional District in the 1880's and 1890's, there was a slightly different map in the 1890's than in the 1880's, but they were the last two plans where black Congress members were elected in North Carolina, prior to this plan here.

Q. Do you have a copy of Stipulation Exhibit 63?

A. I do not have that here currently.

Ms. Smiley: May I approach the witness, your Honor?

Judge Phillips: Yes.

A. Yes, this is Stipulation Exhibit 63.

Q. And is the 2nd District the one you referred to, the Old Black 2nd?

A. Yes.

Q. And did you use that, your knowledge or — you were familiar with this district when you were drawing the plan?

A. Yes. When we started drawing a minority black district that became Chapter 601, I worked with Representative Fitch during our computer training to start creating a majority black district. The point where we started from is — I know from reading history where the [355] location of the black 2nd was and I went back to the legislative library to a map we had in the legislative library in compendium of congressional district maps. We started with the counties in the Old Black 2nd to build a minority black congressional district on the thesis that you can look back in history to perhaps help predict something that can happen in the future.

Q. So, — strike that.

Going back to the Peeler plan, it had a minority district in the northeastern area?

A. Yes, it did.

Q. What's the major difference in the 1st District on Chapter 601 and in the Peeler plan?

A. The major difference is the absence of Durham County, the urban area of Durham County that's the major district between the 1st District of Chapter 601 of the Peeler plan and enacted plan.

Q. When you say that's the major difference, what happened, exactly, to the county?

A. Durham County was placed in the 12th District in both the Peeler plan and Enacted Chapter 7.

Q. What was the effect of that?

A. To make the 1st District far more rural, and in order to allow it to have sufficient population and be majority black, to make it spread far and wide through the eastern [356] and southeastern part of North Carolina.

Q. Was there a political reason, to your knowledge, for putting — removing Durham from the 1st?

A. Yes. There were a number of candidates who had announced or were planning to run for Congress in the 1st District who were black prior to the Justice Department having turned down Chapter 601, one of whom was Thomas Hardaway, who was the author of the Optimum II-Zero Plan that went to the Justice Department and was shown partially at one of the exhibits, Exhibit 421.

I believe that one of the reasons for separating Durham from the remainder of the east and going to two districts was so that Mickey Michaux, who was a prior candidate in 1982 in the 2nd Congressional District, would not be in the same congressional district as Thomas Hardaway, another black legislator.

Q. Now, in the eastern district, there are some narrow corridors connecting different areas.

A. In the enacted plan?

Q. In the enacted plan.

A. Yes.

Q. And in this eastern district, what purpose did the corridor serve?

A. The narrow corridors in the enacted plan served several purposes. They were to connect various areas so [357] the district would be predominantly rural. They were also to help preserve the core of the 2nd and 3rd Districts and 7th District, keep Congressman Lancaster in the 3rd District, Rose in the 7th, and Valentine in the 2nd, in districts that were winnable.

As we did this, part of the situation was that Representative Valentine lived in a precinct that was about 45 percent black, as did Representative Lancaster. So the districts were essentially driven away from those areas so as to aid the chances of those members of Congress in approaching re-election so —

Q. All right, Gerry. In dividing this eastern district and this corridor, did you again use the population statistics through Exhibits 406 and 407?

A. Yes, I did use them again to look at the rural populations, total populations of the districts, not the rural black populations.

Q. Did you run — was it a Places Report?

A. Yes, that was run on this plan periodically as it was developed.

Q. As you were developing the east you would run the Places Report?

A. Yes. The goal and instruction — the goal and resulting instruction was to keep it below 20 percent, above 80 percent of the population of communities of under [358] 20,000 or unincorporated.

Q. Okay. Looking at the Peeler plan again that you were working on, were there changes made in New Hanover County?

A. Yes.

Q. Would Exhibits, Map Exhibits 425 and 426 help you in your testimony?

A. Yes. Exhibit 425 shows the boundaries of the 1st Congressional District in New Hanover County as they were in the Peeler plan. Exhibit 426 shows it as it was in the enacted plan. There are two differences, one on the south central part in the enacted plan. There's about six or eight extra blocks that stick out from the south, and there is one block that sticks out in the enacted plan on the north central part of it that you see. There's more area in the enacted plan in Wilmington there than in the prior plan.

Q. What were the purpose of these changes?

A. I received a fax from the National Committee for an Effective Congress from John Merritt to make these changes which were represented as having been agreed on between Congressmen Rose and Lancaster.

Q. All right. In this redistricting process, did you, on occasion, hear from various Congress people or their aides?

A. Yes, often.

[359] Q. And did you just take instructions from them in making changes, or how did you handle it?

A. No, I didn't take instructions, I received instructions from them, but I didn't carry out anything without approval. Sometimes I would take what they had done and put it on the map to show legislators, and sometimes I would wait to do anything until instructed whether to proceed or not.

Q. Okay. In the Peeler plan again, where was Sampson County?

A. In the Peeler plan?

Q. What had been done to Sampson County?

A. Let me find it.

Q. That's 418?

A. Yes, that's Exhibit 418. In the Peeler plan, Sampson County was divided between the 1st and 7th Congressional Districts.

Q. What did you do to Sampson County?

A. In the prior Congressional Plan from the 1980's, Sampson County had been in the 3rd District, and between the Peeler plan and the enacted plan, Sampson County was moved, which was the home county of Ed Bone, one of the co-chairs of the Redistricting Committee, was made whole and put entirely within the 3rd Congressional District where it had been in the '80's.

[360] Q. Was there an intended effect in your mind on Martin Lancaster's district?

A. Yes, to assist Congressman Lancaster by putting all of Sampson County back in his district.

Q. As a result of your moving Sampson, did you have to do something to Duplin?

A. Yes. In order to keep Fayetteville and New Hanover County in the district, the area of the district reaching down that way was shifted east from Sampson County to Duplin County.

Q. All right. And were there changes made in Pender County going from the Peeler plan to the enacted plan?

A. Yes, there was a change made —

Q. All right, Gerry. Looking at Exhibits 427 and 428, would they help you illustrate your testimony?

A. In Exhibit 427, the yellow shows the area of the 3rd District in the Peeler plan. In 428, the yellow shows the area of the 3rd Congressional District in the enacted plan in Chapter 7.

Q. All right. And what is this a map of specifically?

A. An area called Grady Precincts in Pender County, the central part of the map.

Q. Okay. And what did you do with Grady Precincts, specifically?

A. Well, ensured that blocks 407 — the area of as we [361] move from Sampson to Duplin County, a large — most of Grady Precincts was being put into the 1st District because the district was moving towards the east there with some of these changes. My initial plan for that had almost all of Grady Precincts in the 1st Congressional District.

Q. Which is the Grady Precinct?

A. The precinct line here is not very visible. You can see it on the Peeler plan map.

Q. Can you give us some census block numbers that will help us?

A. Yes. There's a brown line between Blocks 305 and 407 in the northwestern corner of the Map A between Caswell and Pender County.

Q. So if you move to the Map 428?

A. You can see there's a small neck of Grady Precincts in Blocks 407 and 409 that still remains in the 1st District rather than following perhaps a smoother boundary down the river there.

Q. And why were you making these changes to Grady precincts?

A. There was an aide who — I don't know the name of that person — an employee of Representative Martin Lancaster, I understand, a member of district staff, that lived in Block 407 or 409, so that person would continue [362] to reside in the 3rd Congressional District.

Q. And still dealing with the 1st District, for the record will you briefly define who Walter Jones, Sr., was and Walter Jones, Jr., is?

A. Walter Jones, Sr. was, until his death, a member of Congress representing the 1st District, I believe from 1965 until his death. Walter Jones, Jr. is his son and has been a State representative from Pitt County for, I'd say, the eight to ten years prior to enactment of Chapter 7.

Q. Did they live in the same precinct?

A. Yes.

Q. In the course of drawing the enacted plan, what happened to their precinct?

A. The initial — as I mentioned, the initial goal was to keep each member of Congress in their current district.

At some point during the process, Representative Walter Jones, Sr. stated he was not going to run for reelection. So there was much dispute about what to do in this case because Walter Jones, Jr. had said that he was going to be a candidate for Congress, and there was some concern that he would be running in the 1st Congressional District where his father had been a Congressman for many years.

So several different plans alternated that precinct between the 1st and 3rd District until it wound up back [363] in the 1st District in the enacted plan as Mr. Jones made, I think, several protests in committee requesting that be done, and it was.

Q. Okay. Were there some changes in the 1st District made to Wilson County?

A. Yes, there were.

Q. Do you have Map Exhibits 429 and 430?

A. Yes.

Q. Can you use them to tell the court what happened to Wilson County?

A. Unfortunately, they are not in the same scale. One is vertical, one horizontal. 429 shows the north part of Wilson County. You can see the brown area in District 1 is confined to the southern area of the precinct. In the enacted plan, you can see it spread through much of the further northern part of that precinct.

Q. And in your mind, what was the purpose of this change?

A. Representative Toby Fitch, who was one of the co-chairs of the Redistricting Committee, lived in Wilson County, and this was to add more of Wilson County, his home county, to the 1st Congressional District.

Q. Okay. What did the Peeler plan do with Goldsboro and Wayne County?

A. The Peeler plan had — let me look back before I [364] answer that question.

Q. If you want to reference the map exhibit no.?

A. 418. The Peeler plan had all of Wayne County in the 3rd Congressional District.

Q. And is there a major black concentration there?

A. In Goldsboro, yes.

Q. And was there an incumbent in Wayne County?

A. Yes, Representative Martin Lancaster lives in Goldsboro, in Wayne County.

Q. So what happened to that precinct?

A. Well, Representative Lancaster's precinct was — is, I believe, 45, 46 percent black. That precinct was in the Peeler plan — you want me to talk about the Peeler plan?

Q. Well, did you make changes?

A. The only change in Wayne County between the Peeler plan and the enacted plan was that 7 percent in the southeastern part of Wayne County were put in the 1st Congressional District in the enacted plan, but the bulk of Wayne County stayed in the 3rd District, Martin Lancaster's home district, home county.

Q. What would have been the effect on the rural urban nature if Goldsboro had gone into the 1st?

A. If it was there rather than Columbus and Bladen Counties, which are at the very end of the district, the district would have been much more urban.

[365] Q. Had the Department of Justice, in its objection letter expressed concerns about central and south central portions of the state?

A. Yes, in the Justice Department —

Q. Wait a minute.

A. Yes, they did.

Q. In your mind, what were those concerns?

A. The Justice Department said there was substantial black population concentrations in the central and south central portions of the State, and none of those counties were included in a majority black congressional district. And the legislature responded to that letter because many of the counties in the central and south central parts of the state were, in fact, in the enacted plan and placed in a majority black district.

New Hanover, Cumberland, Duplin, Columbus, Bladen, were placed in the 1st Congressional District. Parts of those, maybe one or two more I didn't mention, Pender and Mecklenburg County, which is in the central part of the state, was placed in the 12th Congressional District.

Q. Placing those counties that you just mentioned in the 1st District, would that alter the rural nature of the 1st District?

A. Well, some of those counties are more urban, such as New Hanover and Cumberland, but most of them, Bladen [366] Columbus, Pender, Duplin are very rural.

Q. And in adding those counties, were you able to maintain your rural percentages?

A. Yes. Now, from the Peeler plan, the changes we made there were basically Duplin, changes in Pender, and adding Columbus, yes. In doing those, we were able to keep that balance.

Q. All right. Let's look at the 5th District.

A. Yes.

Q. For a few minutes.

A. Yes.

Q. Who was the incumbent?

A. Steve Neal.

Q. What's his party?

A. Democrat.

Q. Were you aware of any particular concerns about Congressman Neal's district?

A. Yes, I received several phone calls from employees of Representative Neal expressing concerns.

Q. And what was your understanding of those concerns?

A. That when Winston-Salem was added to the Fifth Congressional District, it was as a result of the changes after the public hearing. These aides expressed a lot of concern that Representative Neal could no longer be elected in the district.

• • • •

[380] Q. Let's look at the 8th District.

A. Yes.

Q. Who's the — who was the incumbent in the 8th District?

A. Bill Hefner.

Q. What's his party?

A. Democrat.

Q. Okay. And are you aware of his committee assignment in Congress?

A. He's an Appropriations Subcommittee chair, one of, I believe, eight in Congress Appropriations Subcommittee chairs.

Q. Were any concerns raised about his district?

A. Yes. Representative Martin Lancaster called me personally to express some concerns.

Q. And what's your understanding of the concerns about Congressman Hefner?

A. My concern was that, with the seniority system in Congress, that having senior members, especially those that were Appropriations Subcommittee chairs, were valuable to the State, and Appropriations Committee chairs oftentimes many federal projects found their way to the [381] home state of the Appropriation Subcommittee chairs. And Mr. Hefner was such, and some of the proposed plans, such as the Balmer Congress 8.1 and the Optimum II-Zero Plan would probably result in the defeat of Congressman Hefner.

Q. So how did you address those concerns?

A. Representative Lancaster told me that he thought it was more important, if it came down to a district that would benefit him or Representative Hefner, he would rather have it drawn to benefit Mr. Hefner. So, that was taken into consideration in some of the decisions that were made. But basically we kept Cabarrus County in the 8th District and included, as much as possible, counties in the area of Union County just to the edge of Fayetteville and Robeson Counties; kept them or placed them in the 8th Congressional District.

Q. And what did you believe was the effect of doing that?

A. Was to continue having a district where Congressman Hefner would be reelected.

* * * *

[383] Q. Are you aware of any concerns about Congressman Rose's district, what particular concerns there were?

A. There was a great deal of concern with the one proposal, was to have a district from Charlotte to Wilmington, and that would have taken the core out of the

7th Congressional District to put it in a district that was not even majority black. And it would have — the concern was under that kind of plan with the district from Charlotte and Wilmington, Representative Rose, along with Representative Hefner, would have been defeated.

Q. Is Robeson County in the 7th District?

A. Yes, it is. In the enacted plan, I think all but two precincts were in the 7th District, or maybe all but one precinct; in the prior plan all of it was in the 7th District.

Q. Do you have any particular familiarity with Robeson County?

A. Yes, I do.

Q. What's that, briefly?

A. In 1987 I worked on the merger of the five school units in Robeson County, was responsible for drafting that redistricting plan, meeting with legislators, meeting with members of all three racial groups in Raleigh, as well as [384] in Pembroke.

Q. Did you become familiar with politics in Robeson County?

A. Yes. From reading election returns and from talking to members to persons of all three races from that county.

Q. And what is the demographic make-up of Robeson County?

A. It is — there is no one race that's a majority. I believe that whites are about 40-some percent of the county, Native Americans or Indians, about 33 percent, and blacks about somewhere between 25 to 30 percent of the population. All roughly.

Q. And what are the Indians there, are they a particular tribe?

A. They refer to themselves as Lumbees.

Q. Okay. And was there any reason in your mind for keeping the Lumbee Indians in Rose's district?

A. Congressman Rose had done a lot of work trying to get legislation passed to have the Lumbees recognized as a — federally recognized, which confers all sorts of status under the Federal Law, and working on that project for a decade. I think that I understood there were a lot of ties between Native American groups, because of that, and Congressman Rose.

Q. All right. You mentioned briefly before an [385] alternative that went from Charlotte to Wilmington?

A. Yes.

Q. In terms of that, was that a majority minority district?

A. It was majority if you combined blacks and Native Americans, Indians, yes.

Q. And did you look at election returns from the Robeson County area?

A. Yes, I did.

Q. Okay. And what understanding do you have about cohesiveness of the American Native and African Americans of Robeson County?

A. In Democratic primaries where there's a black candidate or a Native American candidate, in the returns — I looked back all the way from 1982 to '92, that I believe that from for local candidates, such as Clerk of Court of Sheriff or County Commissioner on at-large basis. When there was a Native American candidate, the blacks voted for white candidates, and when there was a black candidate, the Native Americans voted for

the white candidate. No cases did the Native Americans vote for the other race when the race was between a white candidate and member of either of those two groups.

Q. In your mind, based on your work in Robeson County, in combining the Native American and African-American [386] communities, does that form an effective voting block?

Mr. Farr: Objection.

Judge Phillips: Overruled.

A. In my opinion, from examining all the election returns where there were a black or Native American candidate, that it was not an effective voting majority because the Native Americans would, from past history, tend to vote for the white candidate. If there was an American Native candidate, the blacks would vote for the white candidate in the Democratic primary.

Q. In your own mind, was this another objection to another Charlotte to Wilmington district?

A. Yes. In fact, that district would not have elected in, having a black or Native American be the Democratic nominee in a district from Charlotte to Wilmington, yes.

Q. With respect to urban rural characteristics of the area, what were your views about a Charlotte to Wilmington district?

A. That I did a report, one of these Places Reports on the Charlotte to Wilmington district. Of all of the alternative plans before the General Assembly that had two majority black or two majority minority districts that had the least urban percentage of any of the districts, the Charlotte to Wilmington district was the lowest. I think it was, opposed to 80 percent, seems it was in the 50's.

[387] Q. Did it have a rural —

A. Basically half rural, half urban.

Q. In the 7th District that — in the enacted plan what became of the 7th District, could you characterize that in terms of urban or rural?

A. The 7th District in the enacted plan?

Q. Yes, Charlie Rose's district, the 7th District; Congressman Rose's district?

A. I would say I have not run — I did not look on the report for the urban/rural nature of the 7th District. I would say it's probably about 50/50.

Q. Okay. Were there any concerns about Cumberland County and Fort Bragg with respect to the 7th District?

A. Yes, aides to — you know, going back to the previous question, I think the core of Fayetteville and Wilmington were in the 1st District. So probably the 7th would wind up more rural than I stated. In terms of the 7th District and Fort Bragg, I guess there were some concerns about whether the military reservation itself was going to be in the 7th District or not.

Q. And what did you end up doing with the military base?

* * * *

[388] (Witness returns to the witness stand.)

A. The military reservation, that part of it which is in Cumberland County, is in the 7th District of the enacted plan.

Q. Was that part of the core of the prior 7th?

A. Yes.

* * * *

[390] Q. And what about the 2nd District, who was the incumbent?

A. Tim Valentine.

Q. And what was his party?

A. Democrat.

Q. Or is his party?

A. Democrat.

Q. Were you aware of any concerns about Congressman [391] Valentines's district?

A. Yes. That it also be a district where he could be reelected as well.

Q. Did you hear from Congressman Valentine or his people?

A. Not from him personally, but from a number of his aides.

Q. What was your understanding — did they express concerns to you in particular?

A. First concern was that Congressman Valentine not be placed in the 1st Congressional District.

Q. Okay.

A. Second concern that he have as much of his previous district as possible in conjunction with all the other things that were being done all at once.

Q. Were you aware of one of his committee assignments?

A. I believe he's co-chair of the Science and Technology Subcommittee responsible for science research grants.

Q. Did that have some effect on what went into his district?

A. His aides told me he wanted to retain some or all of Durham County in his district. It was the prior core of his district and much of the committee's work, his work on the committee, was trying to direct research

grants to the Research Triangle Park, all the business which had been in [392] the Congressional District and continued to be in the enacted plan.

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[400] Q. And in terms of concluding with Chapter 7, did you zero out the plan?

Can you first explain what zeroing out is?

A. Yes. When any plans are basically done with the initial run through of the plan, it's done with population deviations in the area of 200 to 1,000, plus or minus; but under the Karcher case, it seems to indicate that no deviations are permitted, except in some very unusual circumstances.

So, at the very end of concluding any process, the deviations are reduced to zero or one in each of the 12 districts?

Q. And how do you zero it out?

A. They're taking 11 units, whether they be precincts or townships, one matching each pair of districts that each have a larger population than the deviation at that point. The deviation at that point was 200.

I would look for any persons on any plan with a 12 district plan, would look for 11 precincts where one and two came together, where two and three came together, and starting from one end of the state to the other, and reduce the deviation to zero, and going between the 1st and 2nd District, and between the 2nd and 3rd, perhaps between the 3rd and 4th, moving in one direction or the [401] other, until the deviation was reduced to one for the entire plan.

Q. How many precincts did you have to split?

A. Ten precincts, plus one township in Rutherford County.

Q. When you made these divisions, did you cut any legislative census blocks?

A. No.

Q. Okay. And could you briefly — I think you have talked before about what a legislative census block is.

Explain what distinction you are making with a legislative census block.

A. In zeroing out the districts, either by legislative census block or the Census Bureau census block, but to explain the difference, as I explained, there were about 100 blocks in each category of adding precinct boundaries in 21 counties or showing the boundaries of prior State House and State Senate districts, which we were required to do under Section 5.

Q. So you didn't cut any census blocks when you zeroed out?

A. That's correct.

Q. Does zeroing out have some effect on the lines and shape of a district?

A. It makes them more irregular than they otherwise [402] would have been, if you assume precinct boundaries were regular.

Q. In the enacted plan, you drew two majority black districts?

A. Yes, I did.

Q. Was race a factor in drawing those districts?

A. Yes, it was.

Q. Was race the sole factor?

A. No, it was not.

Mr. Farr: Objection.

Judge Phillips: Overruled.

A. No, it was not. There were a number of other factors that I discussed, chords of existing districts, presuming the opportunities of incumbent congressmen to be reelected, accommodating concerns of individual legislators, members of Congress, committee chairs, other things that I covered in my testimony already.

Q. Does that include the urban/rural analysis?

A. Yes, and including the keeping the 1st and 12th District, one very urban in nature and the other very rural in nature.

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[416] Q. I enjoyed your testimony. I think it's fair to say when Chapter 7 was being created, there was a little bit of political gerrymandering going on?

[417] Ms. Smiley: Object to the term.

Judge Phillips: Well, let him answer if he knows what that term means and can respond to it.

A. I think from the articles that I have read or historical publications, I think there were a lot of press accounts and scholarly articles that called it political gerrymandering.

Q. And you certainly testified today that there were a number of changes that you made to further the interest of incumbent Congressmen?

A. Yes, I had.

Q. And most of the ones that you testified that you made changes for were incumbent Democratic congressmen; is that correct?

A. Most of them were, yes.

Q. And you testified today that there were a number of changes that you made that were suggested by aides to incumbent Democratic congressmen?

A. Yes, I have.

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[420] Q. Was there anything you said, authorized or approved in the submissions to support Chapter 601 that you didn't believe was true at the time you prepared or submitted that material?

A. There was nothing in the submission that I believe to be untrue. There was some things I collected from other people that were put in that I wasn't really sure of, some opinions in there, that I didn't have my own independent basis on, but there was nothing that I put in there that I believed to be untrue.

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[497] Q. Is it not true that you attended a meeting with the Justice Department officials on December 17, 1991, in Washington, D.C.?

A. Yes, it is true.

[498] Q. And Senator Winner, Speaker Blue, Representative Fitch were present at that meeting with you?

A. Yes.

Q. John Dunne, at that point in time, hope I get his title right. Was he the Assistant Attorney General for Civil Rights?

A. I'm not sure of his title.

Q. Did you get the impression he was in charge of the voting rights section for the Justice Department?

A. I got the impression he was making the decision. On the title, whatever title you have to have to do that.

Q. Since the general population of North Carolina was 23 to 24 percent black, it would be fair to have two majority minority districts?

A. He posed it as a question to us. I recall his words were, North Carolina is about 23 or 24 percent black and the plan you submit to us, only one out of the 12 districts or eight percent are black. Don't you think it would be more fair to have two.

That it would more roughly reflect the state's population. I recall him asking that as a question, which is more or less of the same as to what you said.

Q. All right, sir. And would you turn to Trial Exhibit 27?

A. Yes.

[499] Q. Is that not a copy of your December 18, 1991 letter from Mr. Dunne objecting to Chapter 601?

A. Yes, it is.

Q. Isn't it true, Mr. Cohen, that after you, the State, received that letter, that you had conversations with both Senator Winner and Representative Fitch in which they told you that they believed that the Justice Department had exceeded its authority in insisting on two majority minority districts for partisan reasons?

A. I remember something, some legislator saying that, but I couldn't tell you whether it was Mr. Fitch or not. I believe Senator Winner said that. I don't recall whether Mr. Fitch said that or not.

. . . .

[510] Q. Mr. Cohen, prior to the objection letter from the Justice Department, you were of the opinion that Chapter 601 complied with the Voting Rights Act?

A. Yes, I was.

Q. And in your — is it fair to say you changed your mind because of the Justice Department letter?

A. Well, the Justice Department is the administrative agency determined by Congress to determine whether something is in compliance or not, and the government determined it was not in compliance, so I followed the law.

Q. And didn't you say in your deposition you deferred to the expertise of the Justice Department?

A. I don't remember at that point, but I do.

Q. You would defer to the expertise of the Justice Department?

A. I would say in most cases, yes.

Q. Mr. Cohen, isn't it true that you interpreted the Justice D artment letter as indicated that the Justice [511] Department did not see geographic compactness as an issue so long as any plan passed by North Carolina contained two majority minority districts?

A. There was a paragraph near the end of the letter that was some import like that, yes.

Q. Could you turn to Exhibit 27?

A. Yes.

Ms. Smiley: You mean Stipulation Exhibit 27?

Mr. Farr: Yes.

The Witness: I have that here.

By Mr. Farr:

Q. Would you turn to page 4?

A. Yes.

Q. Look at the second paragraph from the bottom?

A. Yes, I have that here.

Q. Could you read that paragraph please?

A. Respecting the Congressional Redistricting Plan. We note that North Carolina has gained one additional congressional seat because of an increase in the State's population. The proposed congressional plan contains one major black congressional district drawn in the northeast region of the State. The unusual convoluted shape of the district does not appear to be necessary to create a majority black district, and indeed, at least one alternative configuration was available that would have [512] been more compact. Nevertheless, we have concluded the irregular configuration of the district did not have the purpose or effect of minimizing minority strength in that region.

Q. Is that the paragraph of the letter that you recall as indicating that the Justice Department didn't seem to be too concerned about geographic compactness as long as any enacted plan had two majority minority districts?

A. Well, they didn't have any concern about the lack of compactness in the First District, but I think, generally, I agree with your statement.

• • • •

[546] Q. All right. Now, with respect to the data available to you as you considered the alternatives?

A. Yes.

Q. Did you have before you anything which indicated the racial percentage in terms of what percent was black, what percent was other or what percent was white?

A. I had before me summary totals for each district, yes.

Q. Was that turned into percentage in any way? In other words, did you have a summary total at any point in your calculations, "X" number of persons and that

was the [547] number of blacks and what the percentage was?

A. There was boxes, or windows we called them, in the corner of the screen that could be expanded or made smaller or larger. They could show the percentages or just the raw numbers. Usually I would show as much as I could. Sometimes they got too big and I would put part of it there to show more of the map on the screen.

Q. So, as you went along, you could, if you wished, through one of the windows have access to the percentage of black population at all times?

A. Yes.

Q. Was that also true with respect to the percentage of black voting age population at all times?

A. Yes.

Q. So as you went you knew in each instance as you made changes what effect it might have on the black voting percent in each of the districts that you were constructing?

A. Yes, that information was always there.

Q. All right. Did you occasionally look at that information?

A. Yes.

Q. And did you, for that matter, do that, not only with respect to the formulation of the two districts for Chapter 7 but, earlier, when you were working on Chapter [548] 601?

A. Yes, I did.

• • • •

[572] Q. You speak of communities of interest. Is there any [573] reference to communities of interest in the criteria that were adopted by the two redistricting communities?

A. Committees.

Q. What?

A. Committees. No. No, sir.

Q. Was there any modification of criteria to include communities of interest?

A. There were no modifications adopted by the committee to the criteria after their initial adoption.

Q. Or was there any action by the General Assembly to change those criteria or to instruct the committees to broaden the criteria?

A. No.

Q. Then would it be true there is nothing in the legislative history of Chapter 7 which purports to adopt or to define communities of interest as a criterion to the establishment of Congressional districts in North Carolina?

A. No, I don't think there's anything in the history to indicate legislature felt it was limited to only take into consideration factors in the criteria.

Q. But your answer is no, setting forth communities of interest; is that correct?

A. That's correct.

• • • •

[588] Q. Mr. Cohen, that's this: Was there a compactness program that was purchased by the state?

A. There was on the screen, one of the report things said compactness, or such like that on it.

Q. And that was part of the software purchased from the PSA?

A. Well, it was part of the report that said on the [589] screen, whenever I tried to use it, it would respond by shutting down the computer system.

Q. I see. So this compactness measure was never used?

A. It was not used.

Q. By you?

A. The first time that that part of the system ever actually worked, that came in a computer upgrade that I believe was installed shortly after the enactment of Chapter 7, and none of this, nor with any computer I ever bought, worked at first exactly like the manual said it was going to.

Q. So the compactness program was purchased originally, but never really worked?

• • • •

[614] Q. Okay. Now, Mr. Cohen, without going over further figures, isn't it clear that the blacks in the center cities in the 12th district have been tied together with corridors with a requisite number of whites to meet the one-person, one-vote standard?

A. To the extent that's part — that certainly is part of the answer, yes, to — what you said is correct.

Q. All right. And isn't it true, basically, that the same process has been followed with respect to some of the cities in the 1st district?

A. Well, the rural areas of the east and northeast are much more heavily black than in the Piedmont crescent, so I don't think that's necessarily quite as true, but there's certainly a correlation.

Q. Certainly to some extent it's true with respect to [615] Fayetteville and Wilmington, isn't it?

A. Well, the corridor from Wilmington on up through Pender County there has some heavy black concentrations in it. Fayetteville, I would say your statement is correct.

Q. Basically in Fayetteville you went down south and through Duplin County, came across and went into Cumberland County, wouldn't that be true?

A. From Cumberland went down to Bladen and Pender and then to Duplin.

Q. Let me ask you this. We had talked yesterday about double cross-overs?

A. Yes, sir.

Q. And isn't it true, in order to get from the northern part of the 1st District to the southern part, you have going down through a corridor in Duplin County, and in going through there, you pass through a point which is that point of double cross-over?

A. Yes.

Q. And by the same token, if Congressman Lancaster wanted to go from the eastern part of his district to the western part of his district, he would have to go through the same point?

A. Yes.

Judge Phillips: You mean if he wanted to stay within the district the whole time he was making his [616] transport?

Mr. Everett: That's correct.

A. There's some parts of the district you have to take a boat from one place to the other, but yes, he would have to go through that point.

Q. Actually, if Mr. Lancaster wanted to do that, he, being a human being, I mean, a person occupying some finite space in the three-dimensional world, it would be

impossible for him to go from the eastern part of his district to the western part without going through Ms. Clayton's district?

A. While he would remain in his district, part of his body would be in the 1st District as well, that's correct.

• • • •

[643] Q. In going through the several counties in Districts 1 and 12 with counsel for plaintiff and plaintiff-intervenors, there was some mention of Section 5 counties and Section 2 counties?

A. Yes.

Q. I'm not going to ask you to go through all of those, but more generally, were the people responsible for the redistricting aware of which counties there had been Section 2 findings concerning in the Gingles case?

Mr. Farr: Objection.

Judge Phillips: Overruled.

A. I would say they were painfully aware of that.

Q. In fact, were any of the leadership involved in the redistricting process representing districts where there had been Section 2 findings?

A. Yes. Speaker Dan Blue had been an at-large member of the House from Wake County. His district was changed to a single member district. Representative Fitch, another co-chairman, was elected for the first time out of one of the single member districts created in the Nash, Edgecombe, Wilson County area by result of the district court order as a result of the Gingles case in the Section [644] 2 finding.

Q. Was there any discussion or awareness of the jurisdictions in the State where there had been Section 2 litigation regarding boards of education, county commissions and so on?

A. That was, I think, well known by the individual members of the legislature who represented that area and, to some extent, by staff and, to some extent, by the committee chairs.

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Q. The question was put to you regarding the criteria that the General Assembly was using in districting and the question is to whether the criteria of community of interest was used.

Did you hear the floor debates on Chapter 7?

A. Most of them, yes.

Q. And there is a full legislative record here of it, but did you hear discussion where the plan was supported on the basis of community of interest?

[645] A. I believe both by Senator Winner and Representative Fitch at least, yes.

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[646] Q. First of all, do you have personal knowledge as to whether the shape of the district was affected by concerns of community interest?

A. Yes.

Q. And what is the basis of that knowledge?

A. Knowing where the various communities in the urban Piedmont crescent lay and where the various areas of the coastal plain lay and nature of their populations.

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[647] Q. Mr. Cohen, do you have personal knowledge on the basis of which the decisions were made?

A. Yes.

Q. And I put to you again the question, to what extent were the shapes of Districts 1 and 12 affected by choices made to respective communities of interest you described?

A. Quite extensively. In the 12th District, it was driven by keeping communities of interest of urban communities in the Piedmont crescent together in one district, many of which were either Section 5 covered, or had Section 2 findings.

In the 1st District, putting together predominantly rural communities in the coastal plain that shared similar interests, and were also a number of which had been subject to the Section 2 findings, and probably a majority which are covered under Section 5.

Q. And what extent — let me ask you this.

Do you know, of your own personal knowledge, whether the shapes of these two districts were affected by the results of various incumbency protection goals?

A. Yes, I do know that.

Q. And what was the extent of the effect on the shapes by incumbency protection goals?

A. Quite extensive. Probably more so in the 1st [648] District that the 12th.

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TESTIMONY OF MILTON F. FITCH, JR.

March 31, 1994

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[659] Q. Representative Fitch, you've now represented that community for close to ten years?

A. Yes, sir, I'm on my fifth term now.

Q. Could you tell the court the kind of issues that, in your experience, are concerns to those voters in your district?

A. Issues of worker safety, workers' compensation, tobacco issues, highways, industry. Basically the same that would affect other individuals.

Q. These concerns shared by black and white citizens?

A. Absolutely. At least 40, 45 percent I would imagine of my district is white.

Q. I believe tobacco is of some importance in that area?

A. Wilson is the world's largest tobacco market. I represent both Wilson, Nash, and Edgecombe Counties. Tobacco's big all across that area.

Q. Representative Fitch, you were elected in December of '84, I guess, and so you started in the 1985 session of [660] the General Assembly, which I assume began sometime about January 1985.

A. About January 4, January 5.

Could you tell the court a little bit about what you did in the first term in the legislature?

A. Well, I guess I didn't know what to expect, but when you got there as a freshman, folks told you freshmen were to be quiet and not talk, listen. I found that pretty hard, but I pretty much kept my mouth closed the first term and then got reelected. And the second term I

got a chairmanship. And usually you didn't get a chairmanship until third term. The second term I chaired the Committee on Housing.

At that point in time, Exxon had some overcharges and problem of the court found they were stripping wells. The Committee on Housing had responsibility of how those funds were allocated to local municipalities per the overcharges, and we dealt with that to a degree.

Then my third term I did the Committee on Public Employees, which had three subcommittees under it, which dealt with all the public employees in the State of North Carolina; their benefits, their salaries, and policies.

The fourth term I chaired Congressional Legislature and Local Redistricting. And now my fifth term I have Constitutional Amendments and Referenda.

[661] Q. By that you mean you are Chairman of that committee?

A. Yes, sir.

Q. Representative Fitch, I'd like to go back just a moment to the Housing Committee that you chaired, I guess, in 1987.

Did that committee receive reports and information regarding housing standards and availability throughout the State?

A. Yes, sir.

Q. And in the course of that, did you obtain information about where housing was needed; which areas were poor, which areas were rich?

A. Yes, sir.

Q. Now, Representative Fitch, you just indicated that you were Chairman of the House Congressional Redis-

tricting Committee in 1991. Who appointed you to that post?

A. Daniel T. Blue, who had been elected Speaker of the House, whom I had known in undergraduate school. And approximately three weeks into that legislative session, as he was putting together his committee chairmen, he called the Committee of Legislative and Local and Congressional Redistricting and called three names, and I thought he had lost his mind. He called three names of Toby Fitch, Ed Bowen and Sam Hunt and —

Q. Excuse me, Representative Fitch. So all three of you [662] were appointed by Speaker Blue?

A. Yes.

Q. Where are Representative Bowen and Hunt from? Tell us a little about them.

A. Representative Sam Hunt is from Alamance County, presently he's Secretary of Transportation for the State of North Carolina. He runs an electric supply company in Burlington.

Representative Ed Bowen is from Sampson County who prides himself as the happiest redneck in the State of North Carolina, who was very pleased to nominate a black named "Blue" for speaker. Sampson County, by the way I grew up, is known to be a redneck area, and Ed is happy to be from Sampson County.

That's why I thought that my life-long friend, Daniel Blue, had lost his mind because there I was, a black named Fitch, from Wilson, who was with a redneck from Sampson County, who was with a redneck from Alamance County. And I didn't know how we were going to all three fit in to be co-chairs together to talk about what I had understood and seen grown men cry over in the past, and that was redistricting turf and who blacks belonged to and who blacks didn't belong to.

And we were able to sit together as very understanding men and work through redistricting, both [663] through Chapter 6 and Chapter 7.

Q. Representative Fitch, would you tell the court a little bit about what you — well, strike that.

Would it be accurate that two of the co-chairs, then, were from the coastal plain and one was from the Piedmont?

A. That's correct.

Q. Would you tell the court a little bit about how the three of you went about, what your duties were as Co-chairs of the House Congressional Redistricting?

A. Our duties, as we saw them, and as nobody's ever written it down, was to be the leader of the committee as the committee undertook to do the task of redistricting. We saw our responsibilities as being those who could come forward originally with what's known as a base plan, which was a beginning point, to say to the other members of the legislature that here's a starting point, bring your ideas forward as we attempt to get a plan which we can accept.

We called our first or second meeting, as I say, we were three weeks behind. The Senate — and the Senate has already had a schedule by which they were going to conduct public hearings. We then sent out a schedule by which we would have public hearings across the State of North Carolina. And I believe there were at least nine or ten public hearings that were across the State from the [664] eastern part to the western part.

Q. Representative Fitch, I want to get back to the public hearings in just a minute, but let me ask you this. The legislature was not just involved, as I understand it, with congressional redistricting, but also involved with State House and State Senate?

A. And any local pieces of redistricting that may come through.

Q. Did you participate in the State House and State Senate redistricting?

A. I'm nor sure if it's a law, but it's at least an unwritten rule the House will redistrict itself and the Senate will redistrict itself, even though we're bi-body and each plan has to be — the actual working on the House plan is done by the House, and the actual working on the Senate plan is done by the Senate.

Q. Would you contrast for the court the differences that you observed between State House and State Senate redistricting on the one hand, and Congressional redistricting on the other?

A. Well, there are more people, there are different people than what we dealt with in the House plans. There's more area, more people, to some degree, attempting to talk to you about what they would want.

Q. Is the relationship different between the Senate and [665] the House in Congressional redistricting and House redistricting, for example?

A. Yes. To a degree it's an adversarial type relationship, at least immediately. When we were appointed, I spoke to my Co-chairs and told them it would be nice if we took a walk across the other side of the building to talk to the Senate Co-chairs about what we might think about that part that we were going to do, at least together.

And when we walked over to see Senator Winner and Senator Walker and Senator Johnson, they informed us the decision had already been made, and that they had gone to Washington and met with the Congressional delegation, both Democrat and Republican, and informed them there would be no minority districts in the state of North Carolina.

And we asked them whether or not they were still the House of Lords and the House of Commons had to follow them, that our idea was that there ought to be at least two minority districts in the State of North Carolina. And them being at the number zero and us being at the number two, brought about a compromise that there would be one that would be done in North Carolina.

Q. Representative Fitch, you mentioned public hearings a moment ago. Representative Fitch, I'd like to show you Exhibit 200, Stipulation Exhibit 200, which is Volume One [666] of the legislative history, and I'd like to refer you to pages 1, 2 and 3 of that 1400-page document and ask you whether that contains the notice of the public hearings at the House and the — House and Senate held.

If I may stand here, your Honor, I have one other thing I need to do.

Judge Phillips: Sure.

A. No, sir, it does not. It does not contain the notice of hearings of both the House and the Senate. It does, in fact, contain the notice of hearings for the House.

Q. Thank you very much, Representative Fitch, for correcting that. Representative Fitch, I would like to refer you specifically to page 2 and 3 and ask you whether or not that one of the matters of particular interest to the committee was the creation of communities of interest?

Mr. Farr: Objection.

Judge Phillips: Overruled.

A. Could you repeat the question?

Q. Yes. Let me approach the witness, your Honor, again. My question, Representative Fitch, relates to the portion on page 2 that says, of particular interest to the communities are the public's ideas concerning communi-

ties of interest appearing at the top of page 3; is that correct?

A. Yes, sir, that's absolutely correct. And that was [667] one of the reasons why we attempted to go across the State to at least ten different places to hear what the public had to say because we did, in fact, want to know.

Q. Why did you all want to hear from the public?

A. Well, the first thing that I thought and that my Co-chairs agreed to is that —

Mr. Farr: Your Honor —

A. We were not redistricting places, but were redistricting people, and that the only way that you knew what people were thinking or contemplating would be that you would go to the people. There are a lot of people who serve in Raleigh and other places that think that folks ought to always come to the seat of government.

I was real adamant with the House folks, we ought to go out to the public to hear what the public had to say. And realizing that we were redistricting people, I was very much willing to get out to see what folks had to say.

Mr. Farr: Excuse me. I should have stated, I would like to state an objection for the record to Representative Fitch's testimony to the extent he's testifying as to what other legislators said on the grounds of hearsay. Would ask that be recognized as a continued objection.

Judge Phillips: We'll receive it and some of it that I have heard is not offered to prove the truth of [668] what's asserted. Some of it may or may not come in under some other, but we'll consider it all subject to hearsay objection.

Mr. Farr: Thank you very much, your Honor.

By Mr. Speas:

Q. Now, Representative Fitch, were you here during the testimony of Gerry Cohen, or some of it anyway?

Q. Yes, sir.

Q. Representative Fitch, Mr. Cohen, as you may recall, was asked about some criteria that the House and Senate committees jointly adopted and I'd like to ask you whether or not your committee adopted any criteria concerning following county lines?

A. No, sir, I don't believe we did.

Q. Could you tell us, at least from your perspective, from your perspective, was that important or not important?

A. To me it was not important. It was not important purely, again, because I looked at redistricting as people and not places. I was aware that there had been a matter that had been litigated that indicated that you could, in fact, split lines when originally I think an old North Carolina case said that you could not; that now you could. And so, no, it wasn't — county lines didn't mean anything to me as we were drawing.

[669] Q. Did you see any advantages, in fact, from dividing a county into two districts?

A. Yes, sir, I did. As I indicated to my folks back in Wilson that, in my opinion, it's a better form of government. That with the division, instead of having one person that you can't stand, you have two people that maybe you can talk to, and that when a county is divided, two representatives represent an area, to me, is better government than one person representing an area.

Q. Representative Fitch, did politics play any part in this?

A. Did what?

Q. Did politics play any part in this process?

A. Yes, sir. Politics was what was and what is that redistricting is all about. I'd never been so popular until I chaired redistricting, both from a Democratic and Republican standpoint.

Sam Hunt, Ed Bowen and myself, everybody knew exactly who we were. And Democrats would come in and talk to you about an issue and then leave, and Republicans would come in and talk to you about an issue. And some Republicans would send other Republicans to figure out, put pieces together so that they had a good idea what an area looked like.

And yeah, politics was everything from a trading [670] standpoint. Everything that I ever heard that politics is or was from my undergraduate training at North Carolina Central in political science is nothing like seeing it working in a redistricting situation. I watched grown men cry and plead not move a line because, if so, they may couldn't get elected or, if you move this block, blacks who had been very good to them in the past no longer would be in their district.

Yes, sir, politics is everything, in my opinion, in redistricting.

Q. And were any compromises made in this process?

Mr. Farr: Objection.

Judge Phillips: Overruled.

Q. Was compromise a part of this process, from your perspective?

A. Just as politics is interwoven into redistricting, compromise is the mother of that. The very — as I indicated earlier, when the co-chairmen got together for a meeting other than to say hello and congratulations on being selected and nominated and placed in as chairman, compromise started right then. Because the Senate had said there would be no minority districts, I had thought,

and my co-chairs thought, there ought to be two minority districts. We started off on the core of compromise and that was to compromise from two to one.

[671] Q. So you personally supported the creation of two majority minority districts from early on?

A. Yes, sir, and I thought that the State of North Carolina had a compelling interest, in my own opinion, to address past discrimination of left out and locked out blacks who had participated in the electoral process.

Q. And I take it you found, during the first session, you weren't able to achieve your goal of two districts?

A. No, sir, I wasn't. With the compromise, I moved forward with one, but I said, and the co-chairs said, throughout the process, that we'll do the job that is before us; that we can get 61 votes on the House side, that we get 26 votes for on the Senate side, and that's what we'll do as elected officials.

And since our plan has to go to Washington, D.C. to the Justice Department, that the Justice Department, we will pray and hope they would do their job. And if they did their job in the fashion I thought they would do, they would reject the first plan and send it back and instruct us to do a second. And that's exactly what they did.

Q. Representative Fitch, in addition to having to compromise your own views about two majority minority districts, can you give us, the Court, some examples of other compromises that had been made in the creation of these districts?

[672] A. Well —

Q. In particular, concerning changing of lines, Representative Fitch?

A. Well, we changed lines where it could be broad line going though, in Chapter 7, going though Wayne

County to accommodate and to help Martin Lancaster. In Chapter 6, we attempted to get some Republican support, more particularly from Representative Coy Privette, and we put a party, and called it Privette Divot. And when we didn't get the support, we withdrew the Privette Divot. And I don't believe we put it in Chapter 7 because we understood that Representative Privette was interested in running for Congress and that was a little section that he was interested in. So we divoted it and put it into the district.

With the creation of the 12th D' rict, in helping congressman seated with the 11th, there was a Republican congressman there. I think compromise was all about it.

There were things that we could have done and could have done them a lot differently, and we didn't. As Mr. Cohen indicated on the stand, he was instructed in no way not to screw any Republicans. Well, I'm the one who told him not to do that. That I had been, in my opinion, I had been discriminated against all of my life and I wasn't intentionally trying to do it to anybody else, [673] regardless of what their label was. But I was going to play the game of politics as we did it and as I understood the role redistricting takes on.

Q. Representative Fitch, let me go back just a minute into the first session that adopted Chapter 601. You indicated that you personally wanted two majority minority districts then.

Were there some plans introduced during that first session in the spring of '91 that would have created two majority minority districts?

A. Yes, sir. I think that there were. I believe that Representative Justus introduced a plan. I believe that even Representative Balmer, and I'm not sure if Representative Flaherty.

Q. Did you support those plans, Representative Fitch?

A. No, sir, I did not. Those plans were introduced by three Republicans and it was my view that the Republicans had a different agenda than what I had. That while they may create some minority districts or some black districts, their creation and their methods of drawing the lines was also to aid Republicans in getting a larger percentage of the congressional delegation than what they presently had. I attempted to stay away from those drawings.

As a matter of fact, I believe when I went back at [674] one point in time looking at it on a purely partisan basis, the Republicans would have been better off with Chapter 600, Chapter 6 than they were with Chapter 7 because there was an opportunity where they have four now. There was an opportunity, based on the configurations, to possibly have picked up a different one.

And we kind of felt, at least I felt, that they would sweep that and race the sand purely because we didn't take in their suggestions and take it in and raise a stink and we will be able to come in again.

Q. Did Republican legislators go to Washington and lobby against the State's plan?

A. I don't know that for a fact but I heard it was done.

Q. In any event, the Department of Justice turned down the State's plan in December of 1991?

A. Yes.

Q. Now, Representative Fitch, there's been testimony here about whether or not the State should have gone to court to challenge the Department of Justice decision.

Would you tell the court about what your view about that issue was?

A. My view was that I was in the catbird seat. That was exactly what I wanted, was two districts. That we

had an opportunity to now do two districts. As I had participated in and was participating in any leadership [675] meetings on the House side. I advocated that we not.

Some had sought to determine whether or not going to the District Court, whether or not there would be a higher standard of burden for the State to have to carry in trying to overrule. The final analysis was that we would not go in and fight to have review from the District Court.

Q. To your knowledge, to what extent was the timing of the election process considered?

A. The upcoming election was close at hand. The filing period; it was time for the filing to open. That was a consideration that North Carolina, with a 12th seat and new seat that we had never had before, arguing about the business of drawing faster than what we could litigate and go ahead on and have an election with a 12th congressperson to be seated.

Q. Representative Fitch, sometime after the Department of Justice, or within some time the Department of Justice rejected the State's request for preclearance, did you see a redistricting plan that appealed to you?

A. Well, I was looking back through a whole lot of things about that time. And having a conversation with folks, the so-called Peeler plan that you've talked about, I think, first originated with me.

I talked to one John Merritt about that so-called [676] Peeler Plan. And then that plan then seemingly went to Tommy Hardaway, and to some other people, and then it came back. And then it was the Peeler plan; but I had seen Representative Balmer, I believe it was Representative Balmer, Charlotte to Durham, that did, in fact, interest me.

Q. Excuse me, go ahead.

A. In Chapter 6, Durham was pretty much put in for numbers and convenience.

Q. Let me clear up one thing. You are talking now about the first enacted plan that included Durham in the majority minority district?

A. Yes, sir, Durham was originally in Chapter 601.

Q. Yeah. What appealed to you about the Peeler plan or the Balmer Plan; what caught your eye?

A. Durham was not in the 1st Congressional District.

Q. And what appealed to you about not having Durham in the 1st Congressional District?

A. Well, I had been in a congressional district with Durham County for ten plus odd years, and the numbers of Durham were overbearing on all us country folks down east. That we always had to suck up to their ways, purely because they had the votes and the numbers.

And while I put Durham in originally, I wanted to take Durham out. And it wasn't just me, it was, as I [677] moved in eastern North Carolina, people used to say, or would say, take Durham County out, they've been in with us long enough and we ought to have an opportunity to elect one of us from the east and not be some representative from Durham who doesn't quite understand the way we live in eastern North Carolina.

Q. I take it, Representative Fitch, you think there's some difference between Durham and eastern North Carolina?

A. Yes, sir, I definitely do. I don't think that all black folks are the same. I don't think they all think alike. And I don't think they all look alike. I don't think they all act alike. There's a difference between a black in Durham and a black in Warren County or a black in Wilson County.

Good friend of mine, Representative Michaux, but Representative Michaux came down in tobacco area with water in the fields dressed in patent leather shoes and silk shirt and driving a black El Dorado Cadillac and he's distinct between the people that act and react to those types of situations.

Q. This plan that you saw, Representative Fitch, what did it do with Durham? Did it put it in with the Piedmont area?

A. Yes, sir.

Q. And did that appeal to you?

[678] A. Yes, sir, it did. With that gone, it then occurred to me that, hey, I've seen Durham and Orange county over the years bounced around to try to create a district to which minorities could have an opportunity to elect a candidate of their choice. And here Durham was now, in a situation with something that I thought they had a commonality with. They were pretty much all areas that had historical black institutions of higher learning, they were urban in nature, and they were not misplaced or displaced into an area that was rural in nature.

In other words, those who wore suits and didn't work in the field, as such, could be with those who wore suits and those who wore bib overalls could kind of be together with us who wore bib overalls.

Q. Representative Fitch, when you saw these plans, were you put in mind of George White's district?

Mr. Farr: Objection.

Judge Phillips: Leading?

Mr. Farr: Yes, sir.

Judge Phillips: Rephrase it, Mr. Speas.

Q. Representative Fitch, when you were looking at these plans, did you think back to earlier times?

A. Yes, sir, I did. As I say, in the past, I had been involved in Eva Clayton's campaign in 1968, and in Howard Lee's campaign in 1972, and both of them constantly in [679] their speeches referred to being the next person to replace George White, and I did have some familiarity with what George White's district looked like. And I then looked back. And then the Charlotte Observer then ran an article that displayed the Old 2nd, the Old Black 2nd.

And so, yes, I did think about that old district. I though about ancestors of mine who were slaves down and around New Bern on the banks of the Trenton River and how that type of situation now applied where New Bern and Wilson again were connected for the purposes of congressional district, and I had some ambitions of running myself.

Mr. Speas: Your Honor, may I determine the number of the exhibit?

Q. Representative Fitch, here beside you is Exhibit 302, which is at least one version of the congressional district present plan.

Could you discuss with the court, for a minute, why the district runs up into Winston-Salem and what role, if any, you might have played in that?

A. Originally, from that that I first had seen come back in this Merritt Plan, I don't believe that Winston-Salem was, in fact, in it. We had a public hearing to which a suggestion was made about Forsyth County in Winston-Salem by Mr. Hunter. And then it made sense, as I talked about the Durham to Greensboro to Charlotte, and that area. [680] Winston made sense, and I'm not too sure if some legislators from that area, black legislators from that area didn't also say to me that they had

been left out and that maybe we ought to look at Forsyth County or part of Winston-Salem being included.

Judge Phillips: Let's take a recess until 2:00.

(Lunch recess taken.)

By Mr. Speas:

Q. Mr. Fitch, Representative Fitch, when we — just before we took a break for lunch, you were talking about the information you received in urban and rural districts.

Let me ask you if you made a decision that that idea should be implemented?

A. I did make that decision and I conferred with my co-chairmen on the House side, and I then instructed Cohen to move forward with the proposition.

Q. And also, just before lunch, you were testifying about the inclusion of Forsyth and Gaston County in the 12th District; did you make the decision to include them in the District?

A. As to Forsyth County, yes, I did. And then later on, as to Gaston County and to Gastonia, to round out that I-85, 12th District, yes.

Q. And did you ask Mr. Cohen to implement that decision?

A. I did, sir.

[681] Q. Let's turn our attention for a moment to the 1st District.

A. Yes, sir.

Q. I notice that the 1st District runs past Goldsboro, down into Bladen, Columbus and Pender counties.

Can you explain to the court the reasons why the district goes into those areas and any decisions you made in that regard?

A. Well, there had been some discussions with the Senate leadership as to political considerations concerning Wayne County, which was the home of the then president pro tem of the Senate, and keeping it whole for the benefit of an incumbent congress person, who was Martin Lancaster.

And then with an attempt to go down, after leaving Wilson County, to then go into Duplin and Pender and down in that area to get into Wilmington. Early on, we had seen plans that had been offered by either David Balmer or David Flaherty that had gone from Mecklenburg down to New Hanover, going through Anson and Moore, and in those areas. That didn't feel right and didn't appear to be the type of district that ought to be.

And looking at some suggestions that were made about the concentration of minorities in the southeast, the decision was then made to do a district that would come through, including Wilson County, a small portion that [682] would then come down through Kinston and then go over into Wayne County and a path cut.

The discussion then was whether or not that path ought to be a wide path or narrow path, and it was politically decided that there was a possibility of getting the president pro tem of the Senate to buy into what the House was suggesting, if we were prepared to take that position out. And the Senate fooled us and never bothered with that, and so that particular narrow situation prevailed and the district was then drawn that way.

Q. The district does not go into Robeson County, I believe?

A. No, sir, it does not. And the district didn't go into Robeson County for some of the same reasons that I spoke of before. And there had been a plan that had been brought forth that had theorized that you could create a majority minority district. That, in the opinion of the chairmen, and as we put forth a base plan, was

not a cohesive minority group. That there had been testimony offered earlier on the House plans from Representative Pete Hasty that, even on the floor of the House, that tended to show those groups were not as cohesive in the Robeson area as one would tend to think that they were.

[683] So we did not use that, using and learning from the experiences of the redistricting plan as it flowed from the State House plan. Statistical data from Representative Hasty was offered at that time showing how that area, meaning Robeson, Hoke and Scotland, and more particularly Robeson, in the division, approximately one-third. One-third had not cohesively been together. And, in fact, either always elected two whites and one black or two whites and one Indian; never been before, except maybe one other time, had a representation that was one, one and one.

Q. Was there any political reasons for not going into Robeson County?

A. Yes, sir. As has been indicated by the previous witness, upon the drawings of Chapter 7 in the making up of what was finally agreed upon to be a plan to which an election could take place, different congress persons attempted to have some input and attempted to make some suggestions, as well as different members who were putting it together, realized that there were other political considerations in that there was some value in the United States Congress being able to remain.

Q. Who was the congress person who represented Robeson County?

[684] A. That would have been Representative Charlie Rose, and there was even people from the area, community leaders would also express the mere fact of Robeson County not going into the 1st District.

Q. And did you consult with the leadership in deciding whether or not to go into Robeson County? The other members of the leadership?

A. There was constant conversation with Representative Ed Bowen and Representative Sam Hunt, I'm sure, because of with Robeson County being the native home of Speaker Dan Blue, that at some point in time I did express to him the desire either to or not to go into that area.

And we had just come out of somewhat of a political bloodbath in that area with the debates from Representative Hasty. So I'm sure at some point in time I did confer with him as to whether or not we were leaning on or not leaning on doing it. But, specifically, I don't recall any specific conversation that I would have had with the speaker.

Q. Were instructions given to Mr. Cohen?

A. Instructions were given to Mr. Cohen not to include Robeson County for political reasons that I spoke of a moment ago.

Q. Representative Fitch, you live in the 1st District, I believe?

[685] A. Yes, sir, I do.

Q. Based on your own personal experiences and knowledge, Representative Fitch, would it be difficult for a person to get around in the 1st District to represent the citizens?

A. I personally do not think that it is. I basically get around a good part of the 1st Congressional District as a lawyer earning a living throughout a good deal of those counties and have practiced and tried cases in a great deal of those counties. I personally do not think that it is hard.

It's like anything else that is new, takes a short period of time to adjust to, but that adjustment period, I thought, would not be long and that it would be relatively easy. They're not all superhighways, not all four-lane interstate quality roads, but a person who sits down can very easily understand how to move about either through the secondary or primary roads of eastern North Carolina to travel, to represent, and to be able to effectively represent those who live within the 1st Congressional District.

Q. Representative Fitch, based on your own personal experiences and knowledge, do you believe that the citizens who reside within the 1st District have things in common with one another?

[686] A. Yes, sir, I do. That the 1st Congressional District, in my opinion, is a district in an area of the State of North Carolina that has been left out and blocked out and not really represented or had anyone that they could cohesively look to toward a representation. It is an area that is, in my opinion, deeply entrenched in poverty, and poverty has no boundaries of county or precinct, and that poverty transcends that entire area, including those areas such as Wilson and Rocky Mount and those others. Basically, on a whole, that area would be cohesive and would have interests of commonality.

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[698] Q. Representative Fitch, with respect to the creation of the first plan, Chapter 601, was it your view at that time that the 1st District was geographically compact?

A. My view at the enactment of the first plan was there ought to have been two. That from the standpoint of being a politician chairing a committee charged with the responsibility of drawing the districts, I drew what

could be agreed upon in the compromise system of politics, and that voice, from time to time, that I was doing my job and I would hope the Justice Department would do theirs. And my committee says that that was, as well as the House and Senate says that this was a plan that we felt, in good faith, was constitutionally permissible as to geographic [699] compactness. I never asked myself that question because compactness, geographically or otherwise, was not one of the criteria to which we were dealing with.

Q. So you never considered it at all during that period of time; that is, leading up to the enactment of 601?

A. No, sir, I answered that question. No, sir.

Q. Similarly, you do not consider it in the period of time leading up to the enactment of Chapter 7?

A. As to whether it was or was not compact?

Q. Yes.

A. Well, I considered that it was ugly, but I didn't consider it in the terms of compactness.

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[712] Q. Now, in your deposition didn't you testify — and see if this is correct — if I had done my job as chairman of the committee and we had gotten the plan forwarded in good faith, that we thought met all constitutional muster, based on the way we knew and understood the Voting Rights Act and all the other pertinent redistricting cases.

Is that a correct statement?

A. That's correct. Same as a statement I made to you just a moment ago in the courtroom.

Q. So, you hoped it would not pass muster but, nevertheless, as a matter of compromise or otherwise, you went ahead and voted for Chapter 601?

A. As I indicated to you earlier or, to somebody's questions earlier, my personal feelings were that because of past discrimination in the State of North Carolina, and leaving out and locking out her citizens of color, that two congressional districts ought to have been created to which minorities would have a reasonable opportunity to elect candidates of their choice. That was my personal feeling.

My political feeling, and my feeling as the chairman of the committee was that in good faith, understanding the [713] law as it had been interpreted to us, and as I understood it to be, along with the compromise that we had at that time, what met the constitutional as well as statutory law. With that, we proceeded, but that didn't keep me, as an individual citizen, from hoping that we could also have another majority minority district.

I happen to believe that black citizens of North Carolina can represent white citizens of North Carolina as white citizens in the past have represented black citizens, and I think that they can do a good job.

Q. So does that mean you think whites in the past have done a good job in representing blacks?

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[717] Q. So compactness was not one of the published criteria?

A. That's correct.

Q. And community interest was not one of the published criteria, was it?

A. I don't know if community of interest was a criteria but I know that we went and that was one of the purposes of the public hearing, to hear what the community had to say and what their interests were in it, as they saw themselves blanketed across new districts to be formed.

Whether or not it was a written criteria as complies with the Voting Rights Act in one-man, one-vote, I don't think it was written except for as it may have been published on the notice of public hearings.

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I do know, at any early committee meeting, we did adopt criteria and at an early meeting we decided we would [718] go nine places, and then one or two representatives said that you are going to these nine places and I would like to have a public hearing in my community, and we extended that to a tenth place separate and apart from the number of public hearings that the Senate also had. So there were 15 or so public hearings to hear what the community had to say about redistricting.

Q. So the timing, in any event, would be shown by —

A. The record would indicate, and the exhibits were, thus, from the minutes of the meeting would indicate which came first.

Q. You became aware that the Senate Redistricting Committee also had criteria, and these were the same as yours, weren't they, so far as you know?

A. I believe that the House and Senate chairs decided that since congressional was something that we had to meet at some point in time, that we could attempt to start by having the same or similar criteria in adopting them together, or else we would have to come back in a conference committee to decide what was actually passed. So in the spirit of trying to work with and get along with our brothers across the aisle, we did it in the beginning in adopting criteria. I believe that's correct.

Q. Your brothers across the aisle are the same people as you referred to earlier as the House of Lords?

[719] A. Yes, sir. They sometimes refer to themselves by their mannerisms as the House of Lords, also.

Q. Did you, in working out your criteria, have the advice and assistance of Leslie Winner and of Gerry Cohen, if you recall?

A. I know that we had, at that point in time, Leslie, and I feel very certain that Gerry also gave input as a staffer as to the types of things that ought to go into criteria for the purposes of the redrawing. Those suggestions were not exclusive.

The matter was opened, and they were presented to the Committee. Either amendments were offered or not offered to what others would think ought to also be criteria, and then whatever the record indicates as finally being the criteria is what was voted upon by a bipartisan committee to which there were at least nine — at least eight Republicans on the House committee, plus Representative Walter Jones, who is now a Republican.

Q. With respect to criteria, isn't the purpose of announcing of — adopting and announcing criteria to let people know why you are doing something?

A. Criteria would be some of the guidelines that should be considered in doing it. They were not — it wasn't all that went into drawing — that was not a written criteria to aid or help incumbents, but, as you move through, those [720] incumbents, Democrat or Republican consideration was given purely because what they may have chaired were to chair or were chairing at that point in time. As in the case of Representative Tim Valentine, who at one point in time some had thought that he ought not to continue to represent Durham and the Research Triangle, but — and having conversation, some of us thought that there was value in having that chairmanship for part of North Carolina, and that senior it — while it wasn't a written criteria, it got to be something that was utilized.

Q. Are you saying, then, that there was actually a concern about having those of us who live in Durham represented by somebody down in rural Nash County?

A. No, sir. What I'm saying to you is those of you who were in Durham before this redistricting effort were represented by Tim Valentine from Nash County, that as we attempted to redraw the lines this time, there was conversation about Representative Tim Valentine, your representative, having worked his way through the seniority system within the United States House and holding a very valuable position that was important to, not only North Carolina, but to the particular area to which he represented.

That, at the stroke of a pen, a congressperson has not power to stop his area from being placed in or taken out. [721] That when all was said and done, it made more sense for North Carolina and for your area of Durham to have that experience and that seniority left to the advantage of Durham and the Research Triangle.

Q. That's because Durham is part of a metropolitan area known as the Research Triangle; isn't that right?

A. I don't' know if that's because Durham is part of the Research Triangle. It's because he moved and positioned himself to chair the committee to which the Research Triangle pretty much comes under that committee to which he chaired, and it made good political sense for me to have a North Carolina, and for him to chair that committee rather than that area to be removed from underneath his constituency and have it represented per chairmanship from somebody from Georgia or Alabama or Mississippi or California.

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[732] Q. Representative Fitch, did I understand your testimony to be that sometime in 1991, when the redistricting process started up, that there was a decision

made by the leadership in the General Assembly that there would be one majority black district?

A. What I said to you, I didn't say it to you, I'm sorry. What I said on direct examination, I went into that session hoping that there would be two majority minority seats drawn. That when I was appointed chair with Representative Ed Bowen and Representative Sam Hunt, that I advocated two. That I was told, when I met with my cohorts from the Senate, that they had met with the congressional delegation in Washington, both Democrats and Republicans, and had indicated to them that there would be no minority seats drawn in North Carolina.

I further said to you, that compromise, in my opinion, started at that point in time, for I thought that we ought to draw two, and the Senate thought that we ought not draw any and so we ended up drawing one.

Q. All right, sir. Do you have any idea about when this [733] meeting took place where you reached this compromise?

A. Well, it really didn't come down as, okay, Fitch, you are right, we won't create two and we won't create any. After that conversation, I was ready to leave and start working on two or one type situation, and it just evolved that when later, when one was advocated that there got to be a meeting of the minds of something that we could them move forward with.

And in a span of time, it wasn't the first week, it wasn't the second week and, it wasn't the third week, because we were not appointed until about the third week. I would have to say it was somewhere between the third week and either the public hearings, or adoption there of criteria, in trying to put it in a span of time for you. So the record would have to show which was the latter, whether it would be the adoption of the criteria or the public hearings. But it was somewhere be-

tween the appointment and that span of time, as best I can recall.

Q. And whenever that was, then, your testimony is that there was a decision reached collectively by the leadership in the General Assembly compromised and to agree there would be one majority black district?

A. Yes, sir, I believe that's correct.

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[734] Q. Where did you get the number two, why not three or four majority black districts?

A. Because I felt that two was the number.

Q. Was that because that's roughly proportional to the percentage of African-Americans in the general population in the State of North Carolina?

A. That's roughly 22 to 25 percent, depending on who gives the numbers.

Q. Is that why you thought there should be two majority black congressional seats?

A. That is, as well as the fact that I thought the State had a compelling interest to remedy past discriminatory practices, yes.

Q. Were you of the opinion two majority black seats would be required by the Voting Rights Act?

A. Yes, sir, I think I pretty much said that when I said I had to uphold the committee. But I felt within myself that a second district should be drawn, and that if I did my job as the way we understood it in the legislature, and the Justice Department did its job, the matter would come back and we would have to create a second one.

Q. Just so I understand your testimony, before the time Chapter 601 was adopted, you had already reached your own [735] personal conclusion that two majority black districts would be required by the Voting Rights Act?

A. Well, I don't know if — that it would be required. I had hoped and felt and had thought that that was what ought to be.

Q. As you interpreted the Voting Rights Act, you thought there should be two majority black districts?

A. Yes.

Q. Okay. During the process of redistricting, Representative Fitch, did you ever use the concept of geographic compactness?

A. Did I ever use the concept?

Q. Yes, sir. did you ever have any statements about geographic compactness?

A. I might have one way or another. I can't say to you that I did or I can't say to you that I didn't. I know that it was not a criteria, but whether or not in some newspaper or in response to some question or here or there I may have used that term —

Q. Did you understand the Voting Rights Act, as it's been interpreted by the courts, as requiring majority minority or the districts to be based upon compact areas of black population?

A. No, sir, I didn't understand it that way.

* * * *

[736] Q. Representative Fitch, do you recall making the statement in reference to Mr. Balmer's plan or Mr. Justus' plan that the two districts that they were proposing with the majority black population would actually

have the effect of weakening the political influence of the black population in North Carolina by packing them in two districts?

[737] A. That sounds like something I might have said politically, yes, sir.

Q. Did you recall saying something like that?

A. I said I don't recall saying that, but that sounds like something that I might have said politically, yes, sir.

Mr. Farr: Can I approach the witness, your Honor.

Judge Phillips: Yes.

Q. Representative Fitch, I'm going to hand you a number article that was included in the submission that the State of North Carolina sent to the Justice Department in support of Chapter 601. It's an article from Raleigh *News & Observer* dated Saturday June 22, 1991, and I ask you if you could read the portion that I have highlighted in yellow. See the if that refreshes your memory?

A. You want it aloud?

Q. Read it to yourself. And after you have done that, does that refresh your memory about whether you ever made any statements in reference to the plan introduced by Mr. Justus or Mr. Balmer, that the two majority black districts they were proposing would have the effect of diminishing black local influence by packing blacks in two districts?

(Short pause.)

[738] A. Yeah, I think I did say this.

Q. All right, thank you. If I did not identify that, that is in the submission for 601. It's labeled C28-F-1.

A. I believe that that, in the context of which that was, also it was whether or not other black leaders in

North Carolina saw it in the particular fashion that I saw it. And I believe that, as you read that, I think you get a better flavor for the total context in which the statement was made.

My thought was based on the way that those districts had been drawn by colleagues in the House who were from the Republican persuasion, that it was their intent to draw distribution. Not to help minorities, but to help themselves, and to just buy in just because they were creating majority minority districts that may have been proportional for the percentage of population. That there were other ways to do it without doing it in a fashion to which you didn't have influence elsewhere.

Q. Prior to the time Chapter 601 was enacted, did you ever request anyone from the legislative staff to prepare a plan for you which would have contained two majority black congressional districts?

A. No, sir, I didn't do that, and I didn't feel I had to do that since I was the one directing the traffic and sooner or later, at one point or another, I felt like what [739] I thought would actually enter into, which it actually did, by way of the Justice Department in its objection.

Q. Representative Fitch, is it not true that there were several base plans that were considered that eventually evolved into Chapter 601?

A. Yes. The base plan — several were started off with what three co-chairs in the House thought that it was built upon from input from other people and from input from public hearings, et cetera, until finally we had a plan that evolved as Chapter 601.

Q. All right, sir. And in all the base plans that you have reviewed leading up to the enactment of Chapter 601, is it not true that the majority black district was designated as the 1st District?

A. I think in every plan, with maybe the exception of one, the nomenclature was accepted that northeastern district was majority minority or would be one. I originally had said call it two, and then I was informed by staff that the numbering started in the east and worked its way toward the west, and then once that was explained to me, it then followed that way that it kept nomenclature of one. I thought that it ought to be two because it would repeat history.

Q. But regardless of the number, the majority black district was considered, up until the time Chapter 601 was [740] enacted, was located in the northeastern part of North Carolina?

A. That is true, with some ideas that we may end up going somewhere else if it all fell in line, like I thought it would fall in line.

Q. Do you recall making a statement that at least one of those places that were considered by your committee leading up to the enactment of Chapter 601 was fair, legal and reasonably compact, given the geography of this state?

A. I don't remember that statement, but I'm not going to say I didn't make it, in the political context in which it was probably asked.

Mr. Farr: May I approach the witness?

Judge Phillips: Yes.

Q. Representative Fitch, I'd like to show you a newspaper article taken from C-28-F-1 of the State's submission in support of Chapter 601. It's a June 26, 1991, article from the *Durham Herald* and ask you if you can read the section that I have highlighted. Ask you does that refresh your memory on whether you described one of the base plans considered leading up to Chapter 601 as being fair and reasonably compact, given the geography of the State?

A. I believe that I did, and in the context to which there was some difference between the House and the Senate [741] as to the congressional plan at that time, and I believe in the context to which our plan was versus their plan, it is how I probably made that statement in response to the question that would have been posed to me at that point in time. But the context was comparing ours with whatever the Senate had at that point in time, I believe.

Q. Thank you. Representative Fitch, do you recall when the Justice Department objected to Chapter 601. At that point in time, did you become convinced that the Voting Rights Act required the creation of two majority black districts?

A. I don't know if the word is convinced or not. I was personally satisfied and happy that they had rejected it. As I indicated to you before, I was happy because I personally thought that North Carolina ought to have two majority minority districts, and whether or not they did it based on the Voting Rights Act or some other, it happened to have fit what I thought was the right thing to do, be it legally, morally or otherwise. And so, yes, I was happy, regardless of what they based it on.

Q. Do you recall making a statement, Representative Fitch, during the House floor debate on Chapter 7 that you believed Chapter 7 went beyond the requirements of the Voting Rights Act?

A. Say what?

[742] Q. Do you recall making the statement during the floor debates in conclusion with Chapter 7 that in your opinion Chapter 7 went beyond the requirements of the Voting Rights Act?

A. I do not recall making that statement. However, it is in the context of floor debate per rank and file members having all sorts of suggestions as to what you

should do and what you should not do. There were a lot of people who thought that we ought to fight it and go to court. There was some who thought we ought to redraw it. There was some who thought different things, so I might very well have made such a statement politically during the debate. Whether or not I actually felt that way or not, I say to you now, as I've indicated before, I always thought that we ought to have done two. Politically, I might have said that.

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TESTIMONY OF DR. ALLAN LICHTMAN

March 31 & April 1, 1994

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[743] Mr. Speas: Professor Allan Lichtman.

As Professor Lichtman is coming around, I will advise the court he will be testifying about a single exhibit, it's defendant's Exhibit 401.

Allan Lichtman, being first duly sworn, testified as follows during **direct examination:**

By Mr. Speas:

Q. In addition, I will advise you that Professor Lichtman's CV appears as Exhibit 1 to his deposition and we present Professor Lichtman as an expert in political history, voting behavior, and quantitative analysis.

Professor Lichtman, have you performed a study of North Carolina's congressional districts for the State of North Carolina?

A. Yes, I have.

Q. And is a report of that study Exhibit 401, defendant's Exhibit 401?

A. Yes, it is.

Q. Would you please, Professor, briefly explain for the court the parts of the report that you have prepared?

A. Yes. There are basically three parts to my report. Part one considered whether there was a rational basis to the North Carolina districting scheme other than race, and in particular, in examining that issue I looked both at the material conditions of other persons included within the [744] districts, as well as evidence of their political opinions to see if there were communities of interest, or as sometimes called communities of interest with respect to these two factors.

Secondly, I examined the question of whether or not these bases, other than race, reflected intentions of the redistricting process by the North Carolina legislature. And finally, I considered some issues relative to the tailoring of the plan from a social science perspective, issues such as the effect of the North Carolina plan on voter participation.

Q. Professor Lichtman, would you describe for the court the manner in which you analyzed the question of the homogeneity of the voters?

A. Yes. The first issue that I considered under the rubric of rational basis other than race, was the extent to which the congressional districts in North Carolina were intentionally homogenous. That is, when you looked at the parts of these districts with respect to both material conditions, things like income and education, and with respect to political opinion, whether those parts were markedly different one to the other within the districts reflecting heterogeneity or whether those parts were similar from one part to the other, reflecting homogeneity.

[745] If the districts reflect heterogeneity, that means people are being placed into the district relatively irrespective of characteristics like income and education or political opinion; conversely, if the districts are relatively homogeneous, that means there is some rationale to the placement of individuals within the district with respect to material conditions and political opinion.

And in particular, I was concerned with the question of whether the challenged districts, that is North Carolina Districts 1 and 12, emerged as especially heterogeneous. That is, did the apparent geographic non-compactness of these districts mean that when you looked at the people within the districts there was heterogeneity; or, conversely, was there no relationship between the apparent geographic lack of compactness and hetero-

geneity, that is, were these districts as homogeneous as other, more compact districts within the plan.

And, in addition, I also compared Districts 1 and 12 to further this analysis to the districts under the relatively more geographically compact 1980 plan as well.

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[747] Q. Professor Lichtman, before describing your analysis of homogeneity, would you explain to the court the relationship, if any, between homogeneity and voting behavior?

A. Yes. There's quite a clear relationship here. First of all, the kinds of factors that I'm looking at, socioeconomic factors like education and income to a great extent, and to a lesser extent; demographic factors like age and mobility related directly in social science studies to voter participation, to the choice of candidates and, of course, to the responsibilities of members of Congress who vote on matters such as taxation, education, social welfare, economic policy. That clearly ties into the socioeconomic, demographic homogeneity or heterogeneity of their districts and, of course, political opinion, likewise, ties into voter behavior quite directly as well.

Secondly, as a specific relationship to redistricting, there is also a linkage here in that homogeneity or heterogeneity ties quite specifically to [748] representation to the extent that districts are homogeneous with respect to either the material interests within those districts or with respect to the political opinions within those districts.

That means that legislators can respond to and represent those interests to the extent to which material interests or political opinions become more heterogeneous or more diverse. It becomes more difficult for members of Congress to recognize and respond to those kinds of interests.

Q. Professor Lichtman, would it be correct that when you are examining homogeneity, you are determining the extent to which the districts group together people with similar social economic characteristics?

A. We're looking at communities of interest, or sometimes called communities of interest with respect to socioeconomic factors, demographic factors and ultimately, political opinion, as well.

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[753] Q. Professor Lichtman, when we adjourned yesterday, you were about to describe your homogeneity analysis; that is, the analysis of whether the districts have grouped together persons of similar socioeconomic and other characteristics.

Before we undertake to go into the tables describing that result, I'd like to show you an exhibit and ask you if you could use this exhibit to describe for the court, illustrate to the court, the data and the methodology you employed with your homogeneity analysis. And this Exhibit, for the record, is 401A, your Honor, and it is a table from the — it is a page from what I believe is Exhibit 334.

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[754] Q. Using Exhibit 401A, Professor Lichtman, could you illustrate the data and methodology you used?

A. Yes. In order to analyze the internal homogeneity of districts, you have to have data that breaks the district down into component parts. The report of the U.S. Bureau of the Census, to which we already referred, I believe 401 does that for each of the districts in North Carolina.

It breaks the districts down into the county or county parts that comprise the district. And we can use [755] that subdistrict data to see whether or not, in the forma-

tion of these districts, the districts were constructed to create commonalities of interest across the parts of the district or whether there was heterogeneity across the parts of the district.

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[756] A. Yes. If you will look at Exhibit 401A, it's an example of the subdistrict; that is, the county and county hard data taken from the census book. And in this case I'm illustrating the data and method by focusing on the median value of housing, which is the next-to-last column. It's the highlighted column on Exhibit 401A, where it says "median in dollars."

And the first set of highlighted numbers pertain to the 1st Congressional District, and they show that the 1st Congressional District is broken down into a large number of counties and pieces of counties. It's the most finely subdivided district in the state in terms of the number of counties and county parts included. The highlighted information is the median value of housing, of homes for each county part or county within District 1.

So, it's a whole county. It's the median value for that county. If it's a county part, it's the median value only for that part of the county that is contained within District 1. And in terms of the homogeneity analysis, we're interested in seeing the extent to which the values [757] of homes differ from one county or one county part to another.

The greater the difference the more heterogeneous; the smaller the difference the more homogeneous. If you look at the highlighted numbers under District 1 for the median value of homes in those counties and county parts, you can see that, although there's a large number of subdivisions, there is a relative commonality among the housing values. The great bulk of the range from

the high 30's to the low 50's in terms of value; only one that's much above 60 and that's the next-to-last entry at 63,800 but that's only 39 houses or homes from Wayne County. So it doesn't figure very much into the analysis.

By contrast, if you look at District 2, which is the next highlighted set of numbers for median values of homes, among the counties and county parts in District 2, although District 2 includes a smaller number of counties and county parts, you can see there's a lot more heterogeneity among the values. The values go from just over 50,000 all the way up to over 93,000. So, there's a much broader range, indicative of greater heterogeneity.

And what my methodology does is, it takes this data and it uses a standard statistical measure of homogeneity to take what we might get intuitively from looking at these numbers and convert it into a standard mathematical [758] statistic. That enables us, for each district and for each of the many socioeconomic and demographic variables included in my study, to compute a single measure of homogeneity that takes into account the fact that there are different numbers of counties and county parts and that they have different populations in them.

And what my tables do in terms of the homogeneity analysis of material conditions, socioeconomic and demographic, is to look at that measure of homogeneity for each of the 12 congressional districts for some 19 variables, either socioeconomic, like median home value or demographic age and person per household, and then we see whether or not the challenged districts, Districts 1 and Districts 12, emerge as particularly heterogeneous. That is, we're testing whether the apparent lack of geographic compactness in these districts means that they are indiscriminately putting together people irrespective of their age or income or education. And that's what the analysis does.

Q. Professor Lichtman, is the results of your first homogeneity analysis reported at Tables 1 and 2 on pages 10 and 12 of Exhibit 401?

A. That's correct.

Q. Would you explain Tables 1 and 2 to the court, please?

[759] A. Yes. Table 1 on page 10 is the underlying base information for all the county parts and counties included within each district for 19 socioeconomic and demographic variables. Table 1 reports this measure of homogeneity that I just described. The lower the value of this measure of homogeneity, the more homogeneous the district with respect to that variable; the higher the value, the more heterogeneous the district with respect to that variable.

If I can just illustrate with the very first variable, that median home value, and value for District 1 and 12, and the value for District 2 at 24.2 illustrates in a formal mathematical way what our eyeball observation of the two data sets indicated, that there's more heterogeneity in the median value of homes in District 2 than in District 1.

Table 2, then, actually analyzes that base information that is reported in Table 1. And it does so by following a simple procedure. For each district and each variable, it ranks the districts from most homogeneous to most heterogeneous with respect to the measure we just computed.

That is, a ranking of 1 on a particular variable would mean that that district, with respect to that variable, is the most homogeneous of all the districts in [760] North Carolina. A ranking of 12 with respect to a particular district and a particular variable, would mean that that district is the most heterogeneous with respect to that variable.

Again, to very briefly illustrate this, if we look at median home value, we can see District 1 has a rank of 2. That means, in terms of the homogeneity with respect to home values, it ranks second most homogeneous; whereas, District 2 has a rank of 12, which means it ranks least homogeneous or most heterogeneous with respect to median home values.

The critical information derived from this somewhat daunting looking table with a lot of numbers on it is the bottom row of the table. The row labeled "mean." For each district, for all the many variables included in the analysis, the bottom row of the table gives you the mean or average rank. It simply sums the ranks and divides. The lower the mean ranking, the more homogeneous the district with respect to all 19 variables.

When you have a low mean ranking, it means the district is ranking close to homogeneous on these many variables. When you have a high mean ranking, it means on these 19 variables, the district is ranking more close to heterogeneous.

If we look at the mean rankings on the bottom of [761] Table 2, with particular attention to the challenged districts, Districts 1 and District 12, our test that we're performing here is whether or not Districts 1 and District 12, the most relatively non-exact districts, also emerge as relatively heterogeneous with respect to the commonalities of interest within those districts.

And thus we look to the mean rank. If we look at the first entry in the bottom row, that is the mean ranking for the 1st Congressional District. It has a mean ranking of 5.1. Given that there are 12 districts, and if it was all about the same, the mean ranking should somewhere be in the order of 6. This is a relatively low mean ranking. That is, it leans on the side not of heterogeneity, but of homogeneity. In fact, District 1 emerges as the fourth most homogeneous congressional district in the State

with respect to the 19 variables, and that's what that 4 in the parens below the 5.1 indicates.

Secondly, if we turn our attention to District 12, the last entry in the bottom row, it has a mean ranking of 4.2, which means it emerges as the second most homogeneous district in the State of North Carolina.

Thus, we look at an array of socioeconomic and demographic factors, and these are the standard factors that analysts look at. You see that not only the two challenged districts not emerge as particularly [762] heterogeneous; they, in fact, emerge as among the more homogeneous districts within North Carolina in terms of their commonalities of interest on factors like home values, rent values, telephones, vehicles, homeowners, income, unemployment, education, age and mobility.

Q. Dr. Lichtman, what impact, if any, could race have had on the results you reported in Tables 1 and 2?

A. Race certainly could have had an impact on the results I report because Districts 1 and 12, as we well know, differ in their racial composition from the other congressional districts in the State.

The information on that, which I'll refer to, but we don't really need to go to, the table is on Table 5 on page 16 of my report, which simply breaks down what we already know about these congressional districts. And they show Congressional Districts 1 and 12 are the most racially mixed districts in the State. They are at about 53 percent black voting age, at about 45 to 46 percent white voting age; they are among the most racially mixed districts in the United States, in fact.

Now, the other districts are much more uni-racial. They are at least 74 percent white in their racial composition, so that's the difference in race. The two challenged districts are mixed; the other districts tend to be predominantly white.

[763] What would this mean for our homogeneity analysis, to the extent the two challenged districts are racially mixed? That would mean it would be more difficult to find homogeneity in those districts as opposed to the other districts in the State because blacks and whites differ very sharply in the State of North Carolina in their socioeconomic standing, and they also differ in their demographic characteristics. And that information, by way of reference, is reported on Table 6 on page 17 of my report. It simply documents that whites and blacks differ sharply in socioeconomic standing, and also to a certain extent, in demography.

Given that, you are including, at virtually equal proportion, two racial groups that differ in things like median home value, education and income. That would make it more difficult, other things being equal, to find homogeneity in the racially mixed districts as compared to the more uni-racial districts where they are comprised predominantly of whites.

To the extent race has an impact on the analysis, it makes it more difficult to find what we do find from the analysis, that Districts 1 and 12 are relatively homogeneous districts.

Q. Dr. Lichtman, in addition to examining Districts 1 and 12 with the other ten districts, did you do any other [764] analysis of homogeneity?

A. Yes, I also compared Districts 1 and 12 in the 1992 plan to all 11 congressional districts in the previous 1982 plan. And the reason I did this was that whether you use the measures of compactness presented by plaintiffs in this matter, or whether you look at the maps, the 1982 plan was apparently more geographically compact that the 1992 plan.

So, I performed a very stringent test to compare the two challenged districts which are apparently not geographically compact to the relatively compact districts

under the 1982 plan, which also split relatively few counties, unlike the '92 plan, and to see if the two challenged districts emerge as relatively heterogeneous as compared to the more geographically compact districts of the 1982 plan.

And because we have a common measure of homogeneity, we can do that. We can compare plans across census areas.

Q. Are the results of that analysis set forth in Tables 3 and 4 appearing at pages 13 and 14 of your report?

A. That's correct.

Q. Would you explain Tables 3 and 4 to the court, please?

A. Yes. Table 3 is, again, the base data on page 13 of my report. It simply reports the basic measures of [765] homogeneity with respect to the Districts 1 and Districts 12 of the 1992 plan, and the 11 districts of the 1982 plan.

Note here that there are many fewer variables included in the analysis. And the reason for that was not some selective principle, but rather I needed to find common variables that were measured by the census for the counties and county parts, both for the 1982 and for the 1992 plan. So that explains why Table 3 is a subset and not a complete reprise of the variables in Tables 1 and Tables 2.

The actual analysis of the base data is reported on Table 4 on page 14 of my report, in which we rank all 13 districts with respect to homogeneity. That is the two districts that we singled out from the 1992 plan, and the 11 districts from the 1982 plan. And we want to see whether, compared to the '82 plan, the rankings of the two relatively non-compact 1992 districts shows that they are relatively heterogeneous.

If you look at the results, they are reported in row 1 and row 2; row 1 for District 1 and row 2 for District 12. We see row 1 out of the 13 has a mean ranking of 7.2, pretty much in the middle, and District 12 has a very close ranking of 7.3. Indeed, the two districts emerge as pretty much smack in the middle of the distribution.

[766] Out of 13 districts, Districts 1 of the new plan emerges as sixth most homogeneous and District 12 of the new plan emerges as seventh most homogeneous. So, even when compared to all of the relatively compact districts of the 1982 plan, there is no indication here that the challenged districts of the current plan emerge as especially heterogeneous. Rather, they come out pretty much in the middle of the distribution. In fact, their average rank of 6.5 is exactly the average rank you get out of 13 districts. Just 13 divided by 2 is the 6.5.

Q. Dr. Lichtman, did you examine the homogeneity question using any data other than socioeconomic and census data?

A. Yes, I did.

Q. And would you explain the data you looked at, this other data?

Yes. The other data that I looked at is the data pertaining to political opinion. The census does not report such data. The census reports basic socioeconomic, demographic, and population data. Therefore, I had to go to an independent data source to get information on political opinion. And I asked the State to commission a poll, and they hired a public opinion firm within North Carolina marketwise to do a survey of public opinion within the congressional districts of North Carolina.

[767] Resources precluded us from examining every single one of the 12 congressional districts in terms of a survey, so what I asked the survey takers to do was, of

course, look at the two challenged districts, Districts 1 and 12, to assess public opinion on certain issues — and I'll get to them in a moment. And then as a control on that, to look at the most apparently geographically compact district in the State, and that is District number 4.

Do I need to go to the board to point it out? Everybody knows, okay.

So what we did, then, was we looked at public opinion in Districts 1 and District 12, and as a control on it the predominantly white, most apparently geographically compact district, District 4, and we asked, marketwise, to do essentially two distinct sets of public opinion type of questions.

One is a standard set taken from the Gallup Poll, and that's the rating of problems as from not all important to very important. And the second set was some policy questions. The questions are outlined on page 19, Table 7 of my report.

And the problems facing the country that we asked about are standard ones: economy, unemployment, health care, poverty, homelessness, the federal budget deficit, [768] crime, educational quality, ethics and drugs.

We then asked three policy questions which we related to federal policy, but which we believed was salient to people in the State, and that included a question about whether you were for an increase in the federal tobacco tax, whether you were for removing U.S. trade restrictions with Mexico, and whether you were for more restrictive federal laws on handgun purchases.

For purposes of statistical analysis, as the table indicates, when I report results for the problem questions, I report them as the percentage identifying the particular problem as a very important problem. And for the policy

questions, I report the results as the percentage for the policy. So, it's very simple percentage type of analysis that we can use with respect to the marketwise survey information.

Now, it's crucial here, in terms of the homogeneity analysis, is that we subdivided the information in exactly the same way the Census Bureau subdivides the North Carolina congressional district. That is, we took the respondents and we broke them down by county or county part.

So, for District 1 we had a set of opinion data for each of the counties or county parts within that district, and likewise for District 4 and District 12. Thus, we could see whether or not opinions were similar or [769] different from one subunit of the district to another, and we could also compare the relative homogeneity of opinion in Districts 1 and Districts 12 to the highly geographically compact District number 4.

Q. And, Dr. Lichtman, are the results of this analysis of the opinions at least for all voters set forth on Table 8 of page 20?

A. That's correct.

Q. Explain Table 8 at page 20 to the court, please.

A. The procedure is slightly different here, but aimed at the same kind of test, because we're dealing with a sample, and because we're dealing with political opinions, the test that I performed was a test of statistical significance.

That is, when you look at the counties or county parts within a district and you looked at the range of opinions on these, each issue separately and each policy question separately across the county and county parts of the district, were there statistically significant differences in opinion across those counties and county parts, or were opinions sufficiently similar that you would not find statistically significant results.

I used the standard test of statistical significance called the chi-square test, and I used a standard level of statistical significance that's conventional in social [770] science analysis called the .05 level, and that corresponds to a probability of five in 100 of getting a certain degree of difference nearly by chance or random factors.

Thus, if the probability of getting results merely by chance was .05 or below, I identified that as a statistically significant difference and so highlighted it on Table 80, page 20 of my report.

Q. Would you summarize Table 20 — excuse me, Table 80, page 20 for the court?

A. Yes. The way to read this table is not to look at the chi-square. That value, I know, is dependent on the number of counties or county parts within the district, but to look at the measure of statistical significance which corresponds to a particular chi-square value, and we can read it right down for each district.

We can see for District no. 1, looking at the ten problem questions and the three issue questions, that there are four statistically significant differences on question three, four, five and question twelve. So, in four instances we found sufficient heterogeneity in opinion for it to be statistically significant.

Likewise, we look at District 4. We also find four instances of statistically significant heterogeneity on questions four, five, eight and eleven. I'm not [771] particularly concerned with the individual questions that are statistically significant, but with, rather, how often we find statistical significance. And we find, again, on four questions.

Finally, on District 12, we find statistically significant results on two questions; question 12 and question 14. To summarize the analysis then, generally opinion in all three districts is fairly homogeneous, you are not finding

in a majority of the questions statistically significant differences. To the extent you want to identify, however, differences in homogeneity based on this, District 12, one of the challenged districts, in fact, emerges as most homogeneous with respect to opinion, with only two statistically significant differences. And District 1 emerges as about equally homogeneous with District 4, with four instances of statistically significant differences.

Now, I wouldn't push that very far because there's not a lot of difference, but basically what the analysis shows clearly is, there's no indication that the apparent geographic non-compactness of Districts 1 and 12 compared to District 4 has meant that with respect to commonalities of interest on political opinion, that Districts 1 and Districts 12 emerge as heterogeneous. To the contrary, they emerge as about homogeneous or, if anything, a shade [772] more so than District 4.

Q. Dr. Lichtman, did you go on to examine the racial effect of opinion?

A. Yes, I did.

Q. And why did you do that?

A. Well, first of all what we find is that, just as there are socioeconomic differences and to some extent demographic differences between the black and white populations of North Carolina, so too, as we find, elsewhere, there are opinion differences among blacks and whites within North Carolina. Those opinion differences are documented in Table 90, Page 22 of my report. They show some rather sharp differences in political opinions between blacks and whites within the state of North Carolina.

For example, question 3 on unemployment. Blacks are more than twice as likely to consider unemployment a very important problem. Question 4, health care.

There, more than fifty percent of blacks consider health care a very important problem. Poverty and homelessness. They're about twice as likely to consider poverty or homelessness a very important problem.

So, once again, given that Districts 1 and 12 are racially mixed and that District 4 is relatively racially homogeneous, it would be more difficult to find upon [773] homogeneity in Districts 1 and Districts 12, given that, again, you are mixing two racial groups. That among these three districts, differ quite sharply in their political opinions.

So, again, from the perspective of a social science analysis, the finding of relative homogeneity, when we looked at all respondents in Districts 1 and 12, is a finding made more difficult by the racial mix of those districts.

Given, then, that blacks and whites differ in their opinion, I was able to do here what could not be done with the homogeneity analysis in the census because it doesn't break it down by county, by race. But because we identified the respondents by race for our political opinion study, we could look separately at the blacks in Districts 1, 4, and 12 and separately at the whites in Districts 1, 4, and 12 and do exactly the same kind of analysis that we did with all the respondents to see to what extent, looking only at blacks, these districts are homogeneous and to what extent, looking only at whites, these districts are homogeneous in their political opinions.

Q. Does Table 10 on page 23 report your analysis of opinion for the black respondents to the opinion poll?

A. Yes, it does.

[774] Q. Would you explain that table?

A. Yes. We can see the results very quickly. On black respondents, there is an extreme degree of homogeneity within each district with respect to black opinion. That is, there's an extreme degree of commonality of opinion across the counties and county parts of District 1, 4, and 12.

District 1, in fact, has no statistically significant differences within it on any of the questions with respect to black respondents only. District 4 has one statistical difference on question 6. And District 12 has only one statistically significant difference on question 12.

Thus, there is no indication, certainly from the table, isolating black respondents that with respect to the black people placed in District 1 and District 12 that, internally, from one part of the district to another that they differ significantly in their political opinions. Indeed, all three districts are about equally homogeneous with respect to black opinion.

Q. And did you examine the opinions of white respondents separately?

A. Yes.

Q. Is that at Table 11 on page 24?

A. Yes.

Q. Would you explain that table, please?

[775] A. Yes. That table, again, is the exact tables that we have been looking at, except it isolates white respondents. And we get a little more difference of opinion among whites within each of these three districts.

If we look at District 1, there are three statistically significant differences. If we look at District 4, there are, likewise, three statistically significant differences among whites. And finally, if we look at District 12, there are two statistically significant differences among whites.

So, there are somewhat more differentiation among whites, but still the conclusion to be drawn from this

table is that, with respect to all three districts, there is a fairly considerable amount of homogeneity of opinion of white residents. And certainly, Districts 1 and District 12 do not emerge as especially heterogeneous. In fact, again, District 12 has the fewest number of statistically significant differences at two; and Districts 1 and District 4 have an equal number, three statistically significant differences.

Q. Dr. Lichtman, at Table 12 on page 25, do you summarize your findings regarding homogeneity and political opinion?

A. That's correct. Table 12, for each district, lists the number of statistically significant differences for [776] all respondents, for blacks only, and for whites only, and then just sums those differences for a kind of a rough hewn comparison.

And, again, this tells us what we've been learning all along, as we go through the tables, that Districts 1 and Districts 12 do not emerge as especially heterogeneous with respect to opinion. In fact, District 12 has the fewest number of statistically significant differences, no matter how you arrange it, at five. District 1 is next at seven and, in fact, District 4 has the most statistically significant differences at eight.

I'm certainly not going to say this analysis shows that non-compactness translates here into greater homogeneity, but certainly the analysis does show there's no indication whatsoever that Districts 1 and Districts 12, relative to compact District 4, are heterogeneous. If anything, Districts 1 and 12 come out about the same or maybe even slightly more homogeneous that District 4.

Q. Dr. Lichtman, to this point in your analysis, you looked at the question of homogeneity from three different perspectives. Would you briefly describe for the court your overall conclusion, taking into account each of those three different examinations of homogeneity?

A. Yes. Whether one looks at census data among the districts of the 1992 plan, that's the first we talked [777] about; or number two, census data for the two challenged districts compared to the 1982 plan, is the second; or the third, which is political opinion.

The findings correspond with one another. The findings do not show that Districts 1 and 12 are especially heterogeneous. They do not show that Districts 1 and 12 are indiscriminately combining persons irrespective of either or their material conditions or their political opinions. If anything, Districts 1 and Districts 12 emerge as relatively internally homogeneous districts representing commonalities of interests along the dimensions measured in the study.

Q. Dr. Lichtman, let's move to another topic. Did you also examine the question whether the districts, that is 1 and 12, are distinctive districts?

A. If I can slightly modify the way you put that. I did indeed analyze the question of the distinctiveness of the 1992 districts, and indeed, that analysis does provide individualized information about 1 and 12. But basically, the distinctive analysis that you asked me about is really a whole plan analysis. It does provide information about any districts you want to spotlight, but fundamentally we're looking at all 12 districts of the 1992 plan and ascertaining the extent to which those districts are distinctive.

[778] This time we're looking across districts from one to the other, not within, and we're looking to see the extent to which the districts are distinctive with respect to one another. If you were indiscriminately combining people in districts, the districts should pretty much look similar. If you are combining them in some systematic way, then you would expect to find distinctions socioeconomically, demographically and in terms of opinion, perhaps as well, across the districts.

Q. And what is the value, if any, of creating distinctive congressional districts?

A. In terms of districting, the value of creating distinctive congressional districts in terms of the whole plan is that you are having a set of districts that do reflect the various different interests within the State, and in this case, the State of North Carolina. And you have, then, a congressional delegation sitting in Washington that likewise reflects the differing interests across the State as a whole.

Q. And Dr. Lichtman, would you explain for the court how you went about performing the distinctiveness analysis?

A. Yes. As I said, this analysis pertains to the comparisons of the district as a whole. So we're looking at one district compared to another, or really all 12 simultaneously compared.

[779] The first thing I looked at, again, was material conditions. And the first thing I focused on on material conditions was people's socioeconomic standing, home values, rent values, vehicles, telephones, education, income, poverty. The reason I isolated here socioeconomic —

Q. Excuse me, Dr. Lichtman. Are you referring to Tables 13 and 14 on pages 27 and 28?

A. Yes. Table 13, beginning on page 27, reports the base data. And the reason I focus on socioeconomic variables that are reflected in Table 13 on page 27 is two-fold. Most importantly, a focus on socioeconomic factors enables you to do a systematic analysis of all the factors, because you can rank socioeconomic factors from high to low. It's meaningful to say a district is high on percent college graduates or high or low with respect to its income. And we would rank all of these and

compare the rankings as a way of assessing the relative socioeconomic standing of each individual district.

And then we want to see the extent to which the districts differ, one from the other, with respect to their socioeconomic standing on this array of standard factors that political analysts look at.

Table 13 on page 27 is simply the base data. It simply reports for each district the values for that [780] district as a whole of socioeconomic factors, like home values, rental values, telephones, vehicles, income, unemployment, poverty, education, professional occupations.

So the table, if you read down the table, down the columns of the table, it's the values of that particular variable for all the districts. If you read across the rows of the table, it's the values for that district of all of the particular variables.

And I just did a very simple look at Table 13 just to see the extent to which, in a very simple way, there are absolute quantitative differences among the variables. And I simply looked at the highest value of a variable given for a given district as to the lowest, also, and took a ratio for median home values.

The highest value for any district is in District 4 at 96,000; the lowest value is in District 1 at 46,000, with a ratio of about 2:1, and that those ratios for each variable is reported on the bottom row of Table 13.

And I just took a mean and an average. The average value of these socioeconomic factors in the highest socioeconomic district as compared to the lowest socioeconomic district is nearly 3:1, so there's a substantial spread of socioeconomic values across the district.

[781] I returned to the actual analysis in a more systematic way on Table 14 on page 28 of my report. And what I have done here is I have simply ranked each

district with respect to each variable. That is, if a district is high in socioeconomic standing for a given variable, like the value of homes, it would have a ranking of 1. That would indicate the values of homes in that district is higher than any other district.

Obviously, a ranking of 12 would mean the value of homes is the lowest in that district as compared to all the other districts. And the ranks in between would correspondingly represent intermediate degrees of difference.

And the last row, last column of the table is the mean ranking the average. When you rank a district across all the variables, and I'll discuss that mean rank in one second. There's a very small correction I should mention for the record; it doesn't affect any of the results, but a number got dropped accidentally under per capita income. Notice there's nothing in the very last row. The very last row should be 11. The row before that, for per capita income, should be 7 and the one up above that should be 4. A number just got misplaced and two numbers got moved up, but the mean rank is not affected.

If you look at the mean rank, you can see District 1 [782] stands out. District 1 is ranked last on every single measure of socioeconomic standing. It has the lowest possible mean rank of 12 and, of course, it's 12th among all the districts in terms of its socioeconomic standing.

The next lowest ranking is for the other challenged district, the other minority district, District 12, but there's quite a difference. District 12 has a mean ranking of 10 as compared to a mean ranking of 12 for District 1.

If you looked at the actual values of the socioeconomic variables, you would see there are pretty substantial differences between District 1 and District 12 in the absolute values of those variables. You can see District 9

and District 1 emerge as relatively high status districts with District 9, having a mean rank of 1.5 and District 4, having a mean rank of 1.9.

If we look at the spread of ranks, we see they are spread. If there wasn't distinctions of districts, if people were indiscriminately put into districts irrespective of socioeconomic status, you would find the ranges clustering around the middle, around the 6.5, 7, 6 ranges. But you can see there's quite a spread of ranges.

In fact, the difference between the mean rank for the lowest district, District 1, and the mean rank for the [783] highest district, District 9, is close to the mathematical maximum. The most you could get for the top district would be a mean rank of 1, if it was straight once across, and obviously the lowest mean rank which you can get, which you do get for District 1, is 12. You have straight 12's across, so the differences between the top ranked district and the bottom ranked district is very close to the maximum.

If it was absolutely at a maximum, you would have the top ranked district with a mean ranking of 1 and the bottom ranked district with a mean ranking of 12. We have the top ranked district with a mean ranking of 1.5 and bottom ranked district with a mean rank of 12.

Q. Dr. Lichtman, what, if any, effect could race have had upon the analysis set forth in Tables 13 and 14?

A. Race certainly can have an effect in the analysis set forth here. Two facts that we already discussed pertain to that. One, of course, is that Districts 1 and 12 have the largest percentage, by a fair margin, of black persons in those districts; and number two, that socioeconomic standing is related to race. That is, black persons in North Carolina tend to have lower socioeconomic standing than do white persons.

So, the relatively low ranking of District 1 and District 12 could be a reflection of the fact that they [784] have relatively substantial numbers of blacks in those districts. The spread of the rankings for the other districts would not tend to be affected by that, however, because they are all fairly equal in their racial composition. They are all predominantly white.

So while the racial composition might affect the relative ranking of 1 and 12, it cannot be responsible for the whole set of distinctions we find in Table 14.

Q. Did you take steps, Dr. Lichtman, to control for the effect of race?

A. Yes, I did.

Q. Would you like some water?

A. That would be wonderful.

Q. Dr. Lichtman, are the results of the control for race set forth in Tables 15 and 16 and 17 and 18 beginning on page 30 of your report?

A. Yes.

Q. Would you explain those tables for the court, please?

A. Yes. There are essentially two ways to control for the impact of race. One is a statistical control and the other is a strict control. I kind of, in a rough way, will discuss the statistical control.

I said it's not likely that race could account for the differences in districts other than 1 and 12 because they are all relatively high in terms of white population; [785] there's not much difference among them in racial composition. Therefore, statistically, race couldn't be much responsible for differences among Districts 2 and 11. That's statistical control.

We can go well beyond statistical control here. We can do a strict control. That's unlike the data broken down by county. The census does divide the whole district data by race, and that enables us to go beyond statistical controls and do a district control for race by looking only at the black persons within the districts, and only at the white persons within the districts. And if race is responsible for the distinctions among the districts, we would expect those distinctions to disappear when we look only at blacks and only at whites.

Q. At Tables 15 and 16 on pages 30 and 31, do you look at blacks only?

A. Yes, I do.

Q. What did you find?

A. Okay. Table 15 page 30, again, is nothing more than the base data, the basic socioeconomic data for blacks only reported by district. And again, I did the same kind of thing I did with the data for all residents. I looked at the extent to which the highest ranked district with respect to any of these variables in greater than, in an absolute sense, the lowest ranked district, as would be [786] expected, since we're now isolating a group that shares socioeconomic characteristics, black people.

The differences are not as great but, nonetheless, the districts don't converge. They are still substantial differences, from high to low, in the values of these variables. And on average, even when black persons are isolated for purposes of analysis, on average, the value of these variables for the highest district as compared to the lowest is 2:1, twice as high in an absolute sense.

We then move on to page 31, which is Table 16, and that again ranks the districts one to the other for only the data for the blacks within those districts and several results emerge from the analysis on Table 16.

A. First of all, District 1 still clearly emerges as by far the district with the lowest standing, even when you're comparing the blacks in that district to the blacks in the other districts.

Again, last time you were absolutely at the mathematical minimum with ranks of 12 right across the board. Here, isolating blacks, you have nearly ranges of 12 across the board. They are all 12 except for college graduates, which is 11, which means give a rank of 11.9. That's the lowest you can get in terms of socioeconomic standing, would be a mean rank of 12.

Again, District 9 emerges as a relatively high [787] socioeconomic difference where, with respect to blacks alone with nearly 1's right across the board, it's all 1's and ranks of 2 for a mean rank of 1.3. So even when blacks are isolated, there's a very sharp difference between the mean ranking of the bottom district, close to the mathematical minimum of 12, and top district, which is very close to a ranking of 1. So the rankings do spread even when you look. And they spread, as well, in between even when you look at blacks alone.

The other interesting finding from Table 16 pertains to District 12. When you look only at black persons, the black persons placed within District 1 are different than the black persons placed within District 12. District 1 is a relatively rural district. District 12 is a predominantly urban district and you do seem to be getting differences between the relatively rural black people placed in District 1 and the relatively urban black people placed within District 12, in that once you control for race, District 1 remains far and away the poorest district. But District 12, once you control for race and look at blacks, has black people who are about average with respect to their socioeconomic standing across the State of North Carolina as a whole.

Q. Dr. Lichtman, in Table 17 and 18, do you look at whites only?

[788] A. Yes.

Q. And those are on page 33 and 34. Would you explain those tables, please?

A. Yes. On page 33, Table 17 does exactly the same thing for whites that we just did for blacks. It reports the base data by district by variable for only the whites within those districts. And again, just as a rough hewn test, I looked at the ratio of the highest value of the socioeconomics for per district to lowest value. I found the ratio almost identical to blacks.

So when you isolate whites only, it will be less of a ratio than when you look at the respondents, because they are a group that has certain socioeconomic districts in common, but there are differentiations among white people in the 12th District of North Carolina.

Table 18 on page 34, then, provides the rankings of the districts. In the case of white people only, District 1 does not quite emerge as the district with the lowest socioeconomic standing of whites, but it's close. It has a rank of 10.5 as compared to District 11, which has a rank of 10.8.

So, District 1 is next-to-last among districts in terms of the socioeconomic standing of white; and District 4 clearly emerges by far as the district with the highest socioeconomic standing among whites. It has a [789] rank of 1 for each and every one of the variables, and thus a mean rank of 1 right across the board.

So again there's a spread. You've got some districts with mean ranks of 10. You have District 4 with a mean ranking of 1. So this shows, again, that even when you isolate blacks, there are distinctions among the districts.

And, once again, the white people of District 1 are not the same as the white people of District 12.

While District 1 ranks next-to-last in the socioeconomic status of the white people in District 1, District 12 again ranks right in the middle, has a mean rank of 7.0, which means it is sixth among all districts in the socioeconomic standing of whites.

So when you strictly control for race and look at blacks and whites alone, a couple of findings stand out. One, there's still distinctiveness among the districts, and the other is that the more refined analysis shows differences between the blacks in District 1 and blacks in District 12 and whites in District 1 and the whites in District 12.

Q. Now, Dr. Lichtman, in Table 19 appearing on page 35 of your report, do you look at a different set of indicators?

A. Yes, I do.

Q. Could you tell the court what you are looking at on [790] Table 19?

A. Yes. What I'm looking at there is demographic. I've now moved from socioeconomic to what I call demographic factors for convenience of analysis.

What differentiates these factors from socioeconomic is you can't rank them from high to low and say you have a common ranking that you can combine and compare. We're talking about things like the percentage born in state, the percent who moved in the last five years, vacancy rate, manufacturing, married person, family age, and so on.

So this isn't the kind of analysis where you can rank like you can on socioeconomic standing. But for completeness, I included the district by district demographic data, and I think there are some important factors that

emerge just by looking at the demographic factors. The first difference that emerges focuses on the first column in Table 19, and that is the urban column. That column simply reports percent urban.

Judge Britt: What page is that on?

The Witness: Page 35, your Honor, Table 19. Page 35, the very first column is just —

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[791] A. I was highlighting the first column on Table 19 on page 35, which is just the percent urban across the various districts. Let me make clear here, this is the census definition of urban. All of the variables I have looked at, all the socioeconomic and demographic variables are as the census reports them. I have done no recalculation, no transformations of any census, so these are all census definitions that's utilized, places of 2500 or more.

And you can see, even utilizing the 2500 census definition, that there are significant differences in the degree of percent urban in the two challenged districts. District 1 is a majority rural district by the census definition. It is 42 percent urban. District 12, however, is the most urban district in the state. It is 86 percent urban, about ten percentage points more urban than District 9, which is about 76 percent urban in its composition.

Q. Dr. Lichtman, have you undertaken to determine the percentage of black citizens in District 12 who reside in urban areas and white citizens in District 12 who reside in urban areas?

A. Yes. I had to do calculations on that because the [792] census doesn't provide such differentiation in its report.

Q. Doctor, does Exhibit 440 set out the calculations you did in that regard?

A. Yes, it does.

Q. Would you explain Exhibit 440, please, to the court?

A. What I was able to do was come up with minimums. That is, the minimum percentage of whites who are urban and the minimum percentage of blacks who are urban. That's the best I was able to tease out of the census data.

It follows a fairly similar procedure. If you look at the first entry on Exhibit 440, it's the total white population, some 230,000. The total rural population in this district is some 75,000.

Q. Again, by the census definition?

A. This is all by census definition. I then make the factual assumption that all the rural population is white. So, in maximizing the number of whites who are rural, minimizing the whites who are urban by the census definition. So, I subtract the 75,000 or so from the 230,000 or so. That gives us 155,594. That's the minimum number of whites who can be urban, since I assumed every rural person was white. I then divided the 155,594 by the total number of whites, and I get 67 percent.

So at minimum, two-thirds of the whites within [793] District 12 live in urban areas, by the census definition. I then used exactly the same procedure for blacks, except in this case, of course, I assumed that all the rural population was black and subtracted the total rural population from the total number of blacks.

I got 237,000 some odd, divided that by the total number of blacks, and I got about 76 percent; 75.9 percent. That's the minimum percentage of blacks in this district who reside in urban areas, as defined by the census. Thus, at least a two-thirds majority of both

whites and blacks by the census definition reside within urban areas within District 12.

Q. Dr. Lichtman, did you also look at the kinds of work performed by people who live in the various districts?

A. Yes, I did.

Q. And is that analysis set forth in Table 20 on page 37 of your report?

A. Yes, it is.

Q. And would you tell the court what that table reports?

A. This takes two groups of categories that the census uses. One is the occupational categories, and that's labeled in the upper left-hand corner of Table 20 on page 37. And it divides it into various categories based upon peoples' occupation, managerial, professional, sales, service, et cetera.

[794] The other is industrial category, what kind of industry are people in. First category, agricultural, fishing for industry, fishing, mining, construction, manufacturing, and so on. For each district, I report, using the census definitions, the percentage of workers who are respectively within each of the occupational categories, and respectively, within each of the industrial categories.

Q. And what do you find?

A. Well, a couple of purposes for this analysis. One was to address the question of, are districts represented by kind of a single industry or occupation? Or, are there manufacturing districts, are there farming districts, are there trade districts, are there professional districts. And if so, does the relative geographic non-compactness of Districts 1 and District 12 mean that somehow they are less representative of a particular occupational or

industrial group than are other districts that are relatively more compact within the State of North Carolina.

Two conclusions emerge from that particular inquiry. The first is that, in a State like North Carolina, with districts as large as 552,000, talking about very, very large numbers of persons, you don't have districts characterized by a single occupational or industrial [795] group, or even generally by even two occupational or industrial groups. Rather, there is considerable differentiation, typically, within the districts, all of them among the occupations and industries.

And secondly, that Districts 1 and District 12, when compared either in the highest single category or in the top two combined categories, do not emerge as especially more diverse in their occupational or industrial composition. So, there is considerabl diversity within the districts, and Districts 1 and District 12 do not stand out in this analysis. And the mathematical demonstrations of that are in my report with respect to either their occupational or industrial composition.

Second inquiry was to focus on whether or not distinctions emerge from District 1 as compared to District 12. Whether or not — not necessarily in the concentration, but in the types of industries that are represented in what's been presented as the relatively rural District 1 as compared to the relatively urban District 12.

And I think, before I get into that I should note that as Dr. Al Stuart pointed out in his report, you would not necessarily expect those differences to emerge in differences in manufacturing because manufacturing in the modern world does not neatly follow urban/rural lines. He [796] points out there's a lot of manufacturing in the relatively rural District Number 1.

So I'm looking for a couple of other types of differentiation here. The first one is between industrial category number 1, the agricultural, fishing, forestry and mining.

This is a relatively small category across the state. You are talking about only a very few percentage of workers who were combined in the agricultural or extractive industries.

Nonetheless, given that you are dealing with a small percentage, there's a distinction between the relatively rural District 1 and the relatively more urban District 12. If you will look under industry, and under agricultural, fishing, forestry and mining, at District 1 it is 6 percent. That's tied for first place. It has the largest percentage of workers, along with District 3 in agricultural and extractive industries.

Whereas, if you run your finger along the row to District 12, it is tied for last, at 1 percent, tied with District No. 9. It's about as low as you can get in that particular category. So, there are differences, then, in agricultural and extractive industry.

The other thing I was looking at is sort of what I might categorize as the post-industrial type of groupings where the more dynamic economies are moving, and that's in [797] the transportation, communication, trade, finance, personal service and professional service. There's a bunch of different census categories that I roughly grouped together in kind of this post-industrial category to see if there are distinctions between what's been described as the more dynamic District 12 and the less dynamic District 1. And indeed, differences do emerge.

If you sum together those five census categories, District 1 has 54 percent, about, of its workers in those categories. That ranks at 11. It's next-to-last in its percentage within those categories. Just behind District 11, which I believe is another rural — excuse me, District 10, another rural district, which is at 52 percent. In contrast, District 12 ranks second. It has 67 percent of its workers in the transportation, communication, trade,

finance and service areas, ranking second only to District 4.

So, not only when you look at agricultural and extractive industries, also when you look at this post-industrial category, District 1 and District 12 are not identical but they differ along lines that you might expect from a more dynamic urban economy as opposed to a less dynamic, more rural economy.

Q. Dr. Lichtman, have you looked at the question of whether this distinctiveness that appears to be emerging [798] is occurring by chance?

A. Yes, I have.

Q. Where do you do that, Table 21 on page 41?

A. Yes, it is.

Q. Would you explain Table 21 to the court, please?

A. It has some fancy looking statistics, but it's really a fairly simple analysis. There are two kinds of distinctions that we can look at for districts within North Carolina. One is the kinds of distinctions were are pursuing in this set of tables on distinctiveness. The differences from one district to another with respect to, most importantly, socioeconomic, but also demographic factors.

Now, as we know, there's also differences within the districts. The districts are not completely homogeneous, but they will differ, as we already saw, with respect to the socioeconomics and demographic variables within.

If I could draw a simple analogy. You have two classes in a school and one class gets a certain average grade and the other class gets a slightly higher average grade. Well, there will be differences in the grades the individual students get within each of the two classes. And what we're testing here is whether the differences from one district to another are sufficiently great, relative to the differences within the districts to be [799] able to say

that those differences from one district to another are systematic rather than the result of chance or random variation, rather than just throwing up the people and letting them fall willy-nilly into districts.

It's the same thing with the two classes. If we observe, there's a different grade in class one as compared to two. We want to look at the individual students to make sure that relative from the differences to one student to the other the differences in the grades between the two classes is great enough to be statistically significant. Those results of a statistical significance test are reported in Table 21 on page 41. And the relevant column is statistical significance.

As I indicated previously, conventionally you would accept a result as statistically significant if the statistical significance was .05 or below, corresponding to a five in 100 or lower probability of getting the results by chance.

To sum up, simply for every one of the variables looked at, there is more than enough difference from one district to another to be able to reject the hypothesis of chance or random variation across districts at a level of statistical significance far more stringent that the .05 level. So we then accept the alternative hypothesis: the differences we have just been looking at from one district [800] to another are far too great to reflect chance or random variation from one district to the other, but the distinctiveness of these districts is systematic.

Q. Dr. Lichtman, when you were looking at the question of homogeneity of districts, you compared districts 1 and 12 in the '92 plan with the 1982 districts. Did you also do that in examining the question of distinctiveness?

A. Yes, I did.

Q. And does that analysis appear beginning with Table 22 on page 42?

A. Yes, it does.

Q. And would you explain to the court what you were looking at here?

A. In our previous analysis, we were kind of looking at the plan unto itself, testing whether or not there were differences; testing whether there as still difference when you looked at blacks and whites separately, looking at distinctions between District 1 and District 12. But it was all part and parcel of the same plan, as was the analysis of statistical significance.

What I sought to look at in the next series of tables was the extent to which the 1992 plan was distinctive from one district to another, as compared to the relatively geographically more compact 1980 plan. Did the relatively more geographical compactness in the 1980 plan mean that [801] the 1980 plan was more distinctive from one district to another than the current plan.

Q. And what did you find, and at which tables are — or which tables are we looking at?

A. We begin the analysis on page 42 with Table 22, which is nothing more than the base socioeconomic data. It's the same socioeconomic data from the '90 census that we reported for the 1992 plan. This is the same set of factors for the 1980 plan and U.S. census of 1980 so I reported the base data. And I looked at, likewise, the ratio, just as I did for the 1992 plan of the highest value here for each variable with respect to the lowest value for each variable, and found on average the value of the highest district for a socioeconomic variable for the 1982 plan was 1.8 times, about 2:1 as compared to the district with the lowest value.

I then moved on to do exactly the same kind of ranking for the 1980 plan that I did for the 1990 plan. That is, to see the extent to which when you look at ranks

you find there's a spread. Is there a spread from a mean ranking of 1 or close to 1 all the way up to a mean raking of 12 or close to 12, or are the districts less spread out with respect to their mean ranking?

The data for all districts of the 1982 plan and for all of the socioeconomic factors is reported in Table 23 [802] with a set of mean rankings on the last column of Table 23. Those mean rankings may not mean a lot by themselves, but we do begin to see some meaning in this analysis when we compare the mean rankings from the 1982 plan with the mean rankings from the 1992 plan to see which set of mean rankings the 1982 plan — or the 1992 plan is more indicative of distinctiveness from one district to another.

That is, which shows the greatest spread among mean rankings. And I did that analysis in two ways. And the results are reported on the bottom of Table 23.

First, I computed the same kind of standard variability or homogeneity score that we have been talking about throughout this analysis. And here, because we're looking at distinctions from one district to another, we're looking to see which plan has the highest score. That is, which plan, when you compare the districts, represents a more distinctive set of districts.

And you can see that despite the greater geographic relative compactness of the 1982 plan, the 1992 plan actually emerges as more distinctive with the distinctiveness score of 50 as compared to a distinctiveness score of of 46 for the 1982 plan.

* * * *

[803] Q. Dr. Lichtman, when we recessed, you were explaining Table 23. Will you continue with your explanation of that, please?

A. Yes. I was looking at Table 23 to see if the relatively more compact 1982 plan emerged as more distinctive. And I first looked at the variabilities among the ranks and found that it did not. That's the first two rows on the bottom of Table 23.

The next two rows perform a similar analysis, except in this case we look at the difference between the highest ranked district and the lowest ranked district. The greater that spread, the more distinctive the districts. And again, 1982's plan does not emerge as more distinctive. To the contrary, the 1992 plan has a spread of 10.5 compared to a spread of 78 for the '82 plan.

Final set of comparison was not to look at the ranks, but to look at the absolute values of the socioeconomic variables and to look at the ratios. We found, again, the 1992 ratio was greater, 2.8 as compared to 1.8, indicating a greater degree of spread in the value of socioeconomic factors for the 1992 as compared to the 1982 plan.

Q. Dr. Lichtman, could race have affected this result?

[804] A. Yes. Since we're looking at distinctiveness across districts, it's certainly quite possible that the way in which you combine blacks and whites into districts can have an affect on distinctiveness because, as we already indicated, race is correlated with socioeconomic factors.

Q. Did you undertake any analysis to see whether or not that occurred?

A. Yes. I, again, performed strict controls — that's a hard thing to say — looking separately at blacks and looking separately at whites for my comparison of the 1982 and 1992 plan. In other words, entered the same analysis for blacks and whites separately that we just looked at for all residents of the two sets of plans.

Q. Do the results of those analyses appear at Tables 24 to 28, beginning on page 45 and concluding on page 59 of your report?

A. The racial differentiated results conclude on page 49.

Q. Would you explain what the tables show for the court?

A. I don't think, without going into the detailed mathematical analysis of each table; they show essentially the same thing. Table 25 on page 46 does the analysis we just went through, except it does it for blacks alone and again, the results do not show that the relatively more compact '82 plan is more distinctive, strictly looking at [805] the black populations. To the contrary, again, the 1992 plan emerges as more distinctive, although perhaps not as much as when you look at all respondents.

Q. And what about when looking at white citizens only?

A. Yes. Table 27 on page 48 does the same analysis for the white population only. And again, it does not show that the relatively more compact 1982 plan is more distinctive.

The differences for whites are not very great; they are quite similar. But on every indicator, the 1992 plan does emerge as slightly more distinctive than the relatively more compact '82 plan.

Q. Now, Dr. Lichtman, did you look at this question of distinctiveness from a statistical significance, in respect.

A. Yes.

Q. Is that at Table 28 on page 50?

A. Yes, it is.

Q. And would you explain to the court what you found in regard to statistical significance and distinctiveness?

A. It's kind of a somewhat different way of looking at distinctiveness, but tapping into essentially the same phenomenon. What I did, I looked individually at the distinctiveness of each separate variable. Before I kind of combined all the variables to look at the [806] distinctiveness of the plans as a whole. Now, I isolated each plan for each of some 20 separate variables and computed our same old homogeneity score. And now, again, we're looking to see which plan spreads out the values of these variables more from one district to another.

The first column of Table 28 scores for the '82 plan. The second column is the scores for the '92 plan. And the final column indicates the direction of difference. A plus, indicating the 1992 plan is more distinctive; a minus, indicating the '82 plan is more distinctive.

There is a little summary down at the bottom of the table and it shows that preponderantly the differences are positive. That is, the 1992 plan preponderantly emerges as more distinctive than the 1982 plan, and that those results are statistically significant. You wouldn't get that kind of preponderance just by chance at a level of statistical significance, yet beyond the .05 conventional level.

Q. Dr. Lichtman, when you were looking at the homogeneity issues, you looked at political opinion. In looking at the distinctiveness issues, did you also look at political opinion?

A. Yes, I did.

Q. Would you explain to the court what you did in that [807] regard?

A. Yes. I already explained the nature of the political data that I obtained from Market Wise. Since distinctiveness is a whole plan concept, we are much more limited in our analysis of distinctiveness for the political opinion data. And the reason is simply that we only have data for three districts, Districts 1, Districts 4 and Districts 12, and we don't have comparative data matched to the districts of the 1982 plan.

So we can only gain limited insight into distinctiveness from looking at the political opinion data. Nonetheless, we can still apply that data to some degree to see, at least among these districts, the extent to which respondents to the survey differ in their political opinions.

Q. And are the results of your analysis in this regard set forth beginning with Table 29 on page 52?

A. Yes.

Q. And would you explain those tables to the court, please?

A. Yes. What Table 29 does with respect to the same set of questions to which we've already been making reference, is compare the opinions across the three districts and then again, using the same chi-square test statistic, determine whether or not there is sufficient [808] differentiation from one district to the other in order to conclude that you can reject the chance hypothesis. That is, reject the hypothesis that the observed differences in opinion are random and instead accept the alternative hypothesis that in this sample the districts of differentiation, in fact, represents something real or systematic among the districts.

And the relevant data is in the last column of the table statistical significance. And it shows at a level of statistical significance well beyond conventional levels for all questions but one. There are statistically significant differences in opinion among these three districts.

One small correction; doesn't affect the final analysis, but it does affect the base data. There's a — if you will

look at the row for 13 and 14, accidentally the row got duplicated. 13 and 14 have the same data reported. In fact, the data on District 12 should be moved down, the 30.4, the 46.3, and the 33.6 should be moved down to District 13, and the correct values for District 12 are 28.8, 50.1 and 37.8. The chi-squares statistical significance are as they stand; there was just a duplication of the underlying data.

Q. And did you look at statistical significance for black and white citizens separately?

[809] A. Yes, I did. And we found some important differences when you isolate blacks separately and whites separately.

Q. Are you looking at Table 30 on page 53, Dr. Lichtman.

A. Yes. Table 30 on page 53 isolates political opinion only for the white respondents to the survey, and you get results much like that which we saw on Table 29, even slightly stronger.

For all questions, there is sufficient differentiation in political opinion among whites across these three districts. To find statistical significance and reject the chance or random hypothesis, this stands in sharp contrast for what we find for black respondents, where there's essentially no statistical difference between — across the three districts.

Only one question emerges as statistically significant. That could be when you are dealing with 14 questions purely as a result of chance to black political opinion does not vary very much from one district to another. Differences in opinion are primarily being driven by differences among whites for the most part.

Q. And turning to Table 31 on page 54, Dr. Lichtman, would you discuss that table with the court, please?

A. Yes. What I sought to look at in kind of a complicated table, a lot of stars on it, is the following question. Given that there are differences that we [810] already documented, sharp ones, between blacks and whites in political opinion among all the respondents, are those differences relatively muted within District 1 and within District 12.

That is, given that we know there are differences between blacks and whites, are those differences somewhat minimized when we look only at the blacks in District 1 compared to the whites in District 1, and when we look only a the blacks in District 12 compared to the whites in District 12. That is, given that there are differences of opinions across the races within the two challenged districts, relatively more homogeneous than you would expect by just looking at blacks and whites overall.

What I did was I compared the blacks and whites in District 1. That's the first column. And then I compared the whites in District 1 to the whites in District 4. That's column 2. Then I compared the blacks and whites in District 12 and then I compared the whites in District 12 to the whites in District 4.

In other words, first for District 1, I was testing the relative difference between whites and blacks in District 1 as compared to whites only in District 1 and whites only in District 4. And I performed the identical comparison for District 12. And what I essentially found was this: that the whites in District 12 had about as [811] much commonality of opinion with the blacks in District 12 as the whites in District 12 had with the whites in District 4. Similarly found, with respect to District 1, that the blacks in District 1 — let me start again.

The whites in District 1 had about as much in common in terms of political opinion with the blacks in District 1

than the whites in District 1 had with the whites in District 4.

So, in other words, the racial differences between political opinions were relatively low when you looked at the blacks and whites internally within District 1 and within District 12. The whites in these two districts had about as much in common with the blacks in their own districts as they did with the whites in the control District Number 4.

Q. Dr. Lichtman, you explained the series of books and distinctiveness. Would you provide the court with your overall summary on the question of distinctiveness based on this series of books of distinctiveness?

A. Yes. Several conclusion follow: One, that the congressional plan of 1992, despite apparent lack of geographic compactness, is a distinctive plan, one that reflects various differences particularly of a socioeconomic nature across the State of North Carolina. That it is relatively distinctive, even compared to the [812] apparently more geographically compact plan of 1982 and that Districts 1 and District 12, despite being virtually identical in terms of their black populations, are indeed distinctive, one compared to the other, with respect to the standing of the blacks and the whites in those two districts and with respect to their urban/rural nature and with respect to their industrial nature as well.

Similarly, we found, to whatever limited extent we could do in opinion analysis, that there were differentiations between the districts, particularly among the white respondents. And finally, on opinion, we also found a relative degree of commonality between the whites and the blacks within the two challenged districts.

Q. Dr. Lichtman, let me turn to another area. As a historian, have you undertaken to look at the legislative records to make a determination as to whether or not

the legislature was concerned with these commonalities that you found?

A. Yes, I did.

Q. Would you tell the court how you did it?

A. I first considered the issue of did the legislature have the information necessary to make socioeconomic differentiations across the State. Obviously they couldn't possibly have this book since this book analyzed districts that weren't created yet. They didn't even have [813] available to them the underlying base census data that this book is constructed from; that is, the census tract, the block group and block data differentiated by socioeconomic or demographic factors.

Nonetheless, based on my experience as a political historian analyst, it was my conclusion that they did have —

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[814] A. Yes. I was going to say legislators, particularly members of a state legislature, by the very nature of their jobs, and even more pointedly by the very nature of their political survival, have detailed knowledge, particularly within their own districts, of the basic socioeconomic, demographic, and political characteristics of their district.

That doesn't mean they could translate that down into some particular unit of census geography, like a block, but that's not necessary to construct districts with a concern for commonality of interest. You don't have to refine it to that level. You basically have to know what are the areas that share socioeconomic, demographic, and political characteristics. And if a legislator is to survive within their own district, they need to know that.

As I cited in my report, there apparently appears to be no dispute over that question between myself and expert

witness for plaintiffs, Dr. Ronald Weber, who was cited as an expert in this same area that I am discussing.

In addition, as a political historian and political analyst, I know that legislators deal with continuing issues and legislation that requires knowledge of demographics and socioeconomics, tax burden, school funding, transportation, communication.

You couldn't do the daily business of a legislature [815] without having this kind of knowledge. And legislators who tend to be very local in their orientation couldn't survive politically without this knowledge. That's what I considered, could this be done if they didn't have this kind of data or have an expert to do the statistical analysis; my conclusion was they could.

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Q. What was the next thing you looked at in this regard, Dr. Lichtman?

A. Next thing I looked at was the actual legislative record itself, particularly the debates and statements of legislators at the time of the redistricting process, with a particular focus on the passage of the second plan, the one that's actually in dispute in this matter.

And as a political historian looking at these issues — let me make it clear, I'm not looking to see if the legislature was of one mind about commonalities of [816] interest, legislatures are never of one mind about issues like this.

Rather, my purpose as a political historian was to look at the record at the time and see whether or not, preserving communities of interest or commonalities of interest, however you might want to phrase that, was an element of the debate, the discussion was advocated as part of the process itself that produced this plan.

Q. And what did you find, Dr. Lichtman?

A. What I found was that, indeed, while there were, as you would expect, disputes and disagreements over how best to reflect commonalities of interest within the legislative plans, that this was certainly something that was discussed, debated, and advocated as part of the legislative process. And that, indeed, there was some pretty specific and detailed demographic data presented, especially on the question of urban/rural and the belief of legislators that by creating a more rural district, as compared to a more urban district, through that process you were, in fact, reflecting commonalities or communities of interest within the State of North Carolina.

This was argued and discussed, but it was certainly part of the process, and was certainly one of the reasons advocated for the particular plan that emerged from that process.

[817] Turning to another area, Dr. Lichtman, have you undertaken to examine the extent to which voters participated in the congressional elections in 1992?

A. Yes, I have.

Q. And would you please explain for the court why you undertook to look at the question of voter turn-out?

A. Because it was my understanding that the issues of representation were issues that were being considered in this matter, and the fundamental representative connection between a member of Congress and the residents of the district is voting. And therefore, if one was to look at representation and the possible affects of this plan, and in particular and relative lack of compactness in Districts 1 and Districts 12 on representation, that the significant test of that would be to see whether or not Districts 1 and District 12, in this, the first election under the plan, or in general, really, the lack of compactness within the North Carolina plan reflected in District 1 and District 12, but obviously reflected in

other districts, as well, has had a depressing affect on the participation of voters in congressional elections.

Q. Dr. Lichtman, would you explain to the court how you undertook to examine this question of voter turn-out?

A. Yes. I looked at what is known as the fall-off rate, rather than focusing strictly on the turn-out in [818] congressional elections as a percentage of the voting age population.

The overall turn-out, that is how many people show up at the polls relative to how many people in the population are old enough to show up at the polls, is a function of many factors; education, mobility, income, all of that which have nothing to do with the configuration of a congressional plan, are critical determinants of the overall level of turn-out.

What I focused on, for the State of North Carolina, was the difference between the presidential turn-out, which is not responsive to the configuration of the congressional plan, and the congressional turn-out, which comes about as close as we can come in this kind of analysis to isolate the effects of the plan itself.

And I sought to see whether the relative lack of geographic compactness within the North Carolina plan has had an effect of undermining participation in congressional elections relative to participation in presidential elections.

Q. And are the results of your first look of that reported in Table 40 on page 61?

A. Yes.

Q. Would you explain that table to the court, please?

A. Table 40 on page 61, looks for the state of North [819] Carolina, at this kind of fall-off rate, the difference

between congressional turn-out and presidential turn-out.

If you look at the column for North Carolina, you see the difference is about three percent. About three percent more voters turned out in the presidential election as compared to those who turned out in the congressional election. Or, to kind of turn it around, about 97 percent of those who participated in the presidential election in North Carolina also participated in the congressional elections.

This is a significant finding on its face. Just on its face, there is a rather minimal fall-off. Almost all of those who participated in the presidential election in 1992 in North Carolina also participated in the congressional election. By way of comparison, the national fall-off rate is somewhere around eight percent, so you are talking about a fall-off rate of well under half; about a third of the national fall-off rate.

I performed, however, further comparison. I looked at the fall-off in four neighboring states: Tennessee, Georgia, South Carolina and Virginia. And I then used the measure of geographic compactness that have been presented by experts for plaintiffs in this case, and sought to see if there's some relationship between the geographic compactness of these plans and the fall-off in [820] these various states.

Before I get to the detail analysis, you can see right off the fall-off in North Carolina is the lowest. It is below that of any of these other neighboring states. Georgia is close, but even Georgia has more fall-off and Virginia, South Carolina and Tennessee have much greater fall-off rates than that of the State of North Carolina, even though, when you look at all three of the measures of geographic compactness that have been presented in this case, North Carolina ranks last on all of them.

In other words, we're getting the opposite relationship we'd expect if a lack of geographic compactness within a state was driving the relationship between the congressional turn-out and the presidential turn-out.

If we turn to the next page, Table 41, it provides rankings which clearly show the lack of correspondence between geographic compactness within North Carolina and fall-off. If we look at the fall-off percent, North Carolina is first. It has the lowest fall-off of any of its neighboring states, yet it is last on all measures of geographic compactness. Whether dispersion, perimeter, or population, North Carolina has the least geographically compact plan, but it also has the lowest fall-off percentage, and with respect to most neighboring states, [821] by a very, very wide margin.

Q. Did you look at the question of roll-off from another perspective?

A. Yes.

Q. What was that perspective?

A. That perspective is reported in Table 42 on page 64. This was, rather than do a comparison with other states or with national levels of fall-off, I sought to do a comparison within the State of North Carolina to the relatively more geographically compact 1982 plan, and in particular, to the last, most recent presidential election conducted under the 1982 plan to see what the differences might be.

And we could see that fall-off was substantially higher, not lower, in 1988 as compared to 1992. In fact, was approximately more than twice as high in 1988 as in 1992. Now, overall fall-off was greater nationally in '88 as compared to '92, but the differences between '88 and '92 are much greater for North Carolina than they were for the nation as a whole.

So, not only aren't you finding, when you do comparisons, that geographic compactness is not undermining voter participation. To the extent the results show any relationship, they're showing a relationship in the opposite direction.

[822] I'm certainly not concluding from this that lack of geographic compactness promotes voter participation. All I'm concluding is there's no indication from the evidence that lack of geographic compactness has the effect of undermining voter participation.

That's true just from the low number on its face of 2.8 percent. That's also true with the comparisons from other states or comparison with the '88 election.

Q. Dr. Lichtman, in your table on 42, the 1988 elections, you were looking at the last set of elections under the 1980's plan?

A. Yes.

Q. And for the '92 elections, you were looking at the first set of elections?

A. Yes.

Q. Doctor, have you also examined for us the question of the extent to which citizens contact their representatives in Congress?

A. Yes. We used our survey data to see to what extent, since the last election, within each of the three districts that we were able to study, respondents reported having had some contact with their congressman, that's self-initiated contact.

Q. Would you explain to the court how you went about doing this?

[823] A. This was self-reporting by the individual survey. We then divided the responses into congressional Districts 1, 12 and 4, and we also separated the responses by race.

So we looked at contact rates for whites within the districts and contact rates for blacks within the districts. It's very important to make that separation because studies have shown that contact rates are very closely tied to peoples' socioeconomic standing, education and income, and there are sharp differences in the contact rates of whites and blacks reflecting differences in socio-economic standings.

So, we examined for the contact data, the contact rates of whites within each district and the contact rates of blacks within each district.

Q. Are the results set out in Table 43 of page 66 of your report?

A. Yes.

A. Explain that table for the court, please.

A. Yes. The first row of Table 43 reports the percentage of white respondents contacting their congress person in Districts 1, 12 and 4.

The second row of the table reports the percentage of blacks contacting their congressman in the same set of districts.

And the final row of the table reports the ratio of [824] white to black contact. That is, by what proportion or what ratio is white contact greater than black contact. The higher that ratio, the greater the differentiation between white and black contacts. That's the data reported in that table.

Q. What does the table show?

A. First, with respect to white respondents contacting the congressperson, it shows that in District 4, that has the highest percentage of white respondents contacting the congressman. Which is not surprising, given that District 4 has Congressman Price, a long-term incumbent

in that district and is a far more affluent district, even for whites, than District 1 and District 12.

Nonetheless, the rates of contact in District 1 and District 12 for whites are not markedly different from that for District 4. They are lower. 21.4 percent for District 12 and 18.5 percent for District 1.

For black respondents, again, District 4, which likewise for blacks is relatively more affluent and has the long-term incumbent, has a contact rate of 17.6 percent. It drops down. And the differences on black contact is somewhat greater for District 4 as compared to District 12 and District 1, with a 12.8 percent contact rate of District 12 and 8.3 percent contact rate among black respondents for District 1.

[825] Finally, we turn to the finding of where the differentiation is greatest for the ratio of white to black contact. I think this is relevant to an issue that's been raised, and that has to do with the correspondence between the races of the constituent and the race of the congressperson.

Districts 1 and Districts 12, although represented by new congresspersons, are both represented by black congresspersons. District 4 is represented by a white congressperson. Yet, the fall-off between contact by whites and contact by blacks is least in District 4, which has a white congressperson, and greatest in District 1 and Districts 12 that have a black congressperson.

In other words, for District 1, the ratio of white to black contact is over 2; for District 12 it's about 1.6; and for District 4 it's the lowest, 1.4.

In other words, the ratio of the contact by whites as compared to the contacts by blacks is lowest in that congressional district represented by a white congressperson. So whatever is driving the relative lack of contact by blacks as compared to whites, it is not the

race of the congressperson. And indeed, among whites overall, as we saw, there's not much differentiation based upon the race of the congressperson, with relatively small differences between Districts 1, 12 and 4, especially in [826] light of the fact that District 4 has that long-term incumbent and is a more affluent district.

Q. Did you undertake one final analysis for us?

A. Yes.

Q. Is that analysis in Table 44 on page 69?

A. Yes.

Q. Would you explain to the court what that's about?

A. Yes. That brings us back, in a sense, to this issue of commonalities of interest. We examined extensively early on the extent to which the current plan has districts that represent commonalities of interest is distinctive, and the extent to which the district that was created as an urban black district differs from the district that was created as a rural black district.

So what I looked at was in this plaintiffs' alternative plan, which I believe is this plan up on the chart here, labeled the Shaw III Plan. Does that plan, to the best of our ability to analyze it, preserve the urban/rural distinctions that I believe were intended by the legislature and that I believe I reflected in the many analyses that I performed earlier.

What we had to do here was match, since we didn't have this data back for the Shaw III Plan. We had to match census tract and block group data, which identifies urban and rural residents to the two minority districts of [827] the Shaw III Plan, which is the rural District 1 and the relatively more urban District 3.

We were able to do it for about 92 percent of the population within District 1 and 87 percent of the population within District 3, so the great bulk of the populations of the two districts are included within this analysis.

And what Table 44 shows in its first panel, the upper panel, is that when you look at plaintiff's District 1 as compared to plaintiff's District 3, it does not preserve the degree of rural/urban differentiation based on the census definition that is preserved within the current plan.

The current plan and the alternative plan have about equally rural districts; 42 percent, 41 percent. No significant difference there. But they differ sharply, to the best of our ability to analyze it, in the urban district. The State's plan is 86 percent urban, the plaintiff's alternative District 3 for the 87 percent we could measure is only 67 percent; 20 points less urban than the State's plan District 12.

Even if we were to assume that all the remaining 13 percent that we couldn't match was strictly urban, that would still — that's a counter-factual assumption; that would only move plaintiff's alternative District 3 up to [828] about 71 percent, still well behind the urban percentage of the State's plan District 12.

So, to the extent urban/rural differentiation is fundamental to the State's plan, that same degree of differential is clearly not preserved within plaintiff's alternative plan, and thereto a majority minority districts.

Second panel of Exhibit 44 simply looks at the racial composition of the State's plan and the alternative plan. And the main point I want to make here is both with respect to the State's plan District 1, which is the first row of the second panel, and state's plan District 12, there is a majority black population. And based upon Dr. Richard Engstrom's ecological regression, analyses of racially polarized voting, the black populations within North Carolina are highly cohesive politically. And we also saw they shared political interest from the opinion

data we were able to muster with respect to blacks in North Carolina.

However, while plaintiffs' alternative District 1 does include a black majority, plaintiffs' alternative District 3 depends upon a combination of blacks and Native Americans, and some of other races, to form a voting age majority of minorities.

And as we likewise saw from Dr. Richard Engstrom's [829] reports, particularly with respect to primary elections, there's not the same kind of commonality of political behavior between blacks and Native Americans as there is within the black population itself.

So again, to the extent there's a concern to create districts where the minority group shares a commonality of political choices and political opinions, that seems to be better represented in the existing plan as opposed to the relatively more compact alternative plan presented by experts for plaintiffs.

• • • •

[829] Q. Dr. Lichtman, did you participate in any way in the legislative process or the redistricting process that lead to either Chapter 601 or Chapter 7?

A. No.

Q. Have you ever drawn a congressional redistricting plan?

A. No.

[830] Q. When was the socioeconomic analysis which you based your report, Doctor?

A. I can't hear you.

Q. When was your report — when was the analysis on which you based the tables in your report conducted?

A. The last several weeks and months.

Q. And what data was that analysis based upon?

A. Primarily two data sets; one is the census report on the 1992 congressional districts and the census report on the 1982 congressional districts. And, of course, the survey of opinion that I also cited, as well as some, in a minor way, some political data.

Q. The survey that you cited was conducted when?

A. 1993.

• • • •

[850] Q. Dr. Lichtman, do you see the data listed under District 12?

A. Yes.

Q. Is it true that that data indicates that 6 percent of those polled identified Mel Watt as their congressman?

A. Yes, sir.

Q. In District 12?

A. Yes.

Q. Does it also indicate that 6 percent of those polled [851] in District 12 believe Jesse Helms was their congressman?

A. I don't know, let me find that. 4 to 6.

A. 6 on the total, right?

Q. And does it also indicate that of the respondents in District 12, 8 percent believed Alex McMillan is their congressman?

A. Yes, 5 to 8, depending on whether it's black or white.

Q. And those congressmen, Doctor, had been in office almost a year at the time this poll was taken?

A. I don't believe Jesse Helms is a member of Congress, maybe the Senate.

Q. 6 percent of the voters in District 12 apparently do. Dr. Lichtman, the incumbent in District 12 had been in office for approximately a year at the time the poll was taken?

A. Close to it, not quite.

Q. You believe that, given the length of incumbency and in light of those answers, that this has no significance with respect to representational issues?

A. Let me explain my answer. You didn't give us the rest of the story, which is the recognition for Eva Clayton.

Likewise, in a district that plaintiffs have identified as a textbook example; geographic, lack of [852] compactness, in a district that has been criticized for being divided into more media markets than any district in the State, in a district that splits and combines more counties by far than any district in the State. The very same information that on this very same table that you reported to me shows 32 percent, 30 to 34 percent of the respondents in District 1 recognized Eva Clayton as their member of Congress. That's an extraordinary recognition level for a first-term congressperson in a brand new district who had a relatively uncontested general election.

Therefore, I cannot, from this data, make any conclusion that county splits, lack of geographic compactness or division of media markets seems to be the critical differentiation between recognition. To the best I can differentiate, Eva Clayton — and one is, quite frankly, higher than you would expect, is that Eva Clayton had tightly contested primary elections. And the one study we know about, Dr. Niemi's study, points to the importance of the media studies and Mel Watt did not have those same kind of, in contrast, have the same contested primary elections.

• • • •

[866] Q. Okay, Mr. Watt. Now, with respect to the table that you discussed from the poll, percentage of respondents contacting congressmen since the last election. When that question was asked, was there any way to determine whether [867] or not the person responded was, in fact, accurate about who that person's congressman was?

A. No.

Q. Now, isn't it true, also, that, according to the poll that's been referred to, twice as many people in the 12th District thought that Mr. Coble was their congressman as thought that Mr. Michaux was?

A. I don't have that.

Q. Or Mr. Watt was?

A. I don't have exact recollection of whether that was correct.

Q. Could you check?

A. Yes, sir.

Q. Pardon me?

A. Yes.

Q. So that was 12 percent?

A. Approximately.

Q. And how many — what percent thought Mr. McMillan — that Watt was there congressman?

A. I think 5 to 7. I can look. 5 to 8.

Q. So that roughly 20 percent of the people who responded misidentified the congressperson and identified a congressperson from a surrounding area; would that be correct?

A. Close to in the high teens.

[868] Q. And then there were a variety of others who were mentioned as representing the 12th District in this telephone poll, weren't there, including Mr. Helms?

A. There were a few others.

Q. Like who, and the percentages?

A. Half a percent for Steven Neal. We already went over Jesse Helms, 4 to 6 percent.

Q. When you say 4 to 6, what do you mean?

A. It's broken down by race in black and white. Steve Neal 5, Faircloth something under 1, Clayton something under 1, Valentine something around 3.

Q. Now, doesn't this inability to correctly identify the congressional representative indicate some confusion on the part of the respondents?

A. Yes.

Q. With respect to the respondents, could you tell me whether those were selected to be registered voters or were they selected at random from a telephone list or how were they selected?

A. They were not necessarily registered voters. They were people who were eligible to vote. Adult respondents randomly selected in the congressional districts.

Q. And of the respondents, after making allowance for the erroneous answers, was it true in the 12th District, 64 percent did not know at all who their congressperson [869] was?

A. I would question your characterization of that. It's not didn't know at all, it's couldn't recall. This was a recall question, where they have to name it as opposed to picking it from a list. 64 is not correct. It's somewhere between -- it's 44 for whites and 64 for blacks, so somewhere in the low 50's.

Q. Then, with respect to the percentage of white respondents in District 12 who had contacted the congressman since the last election, which is 21.4 percent, isn't it true that a substantial number of those may have actually been contacting the wrong congressman?

A. It is possible; we don't know. They may have contacted the right congressman and not recalled the name at a later time.

* * * *

[869] Q. You are familiar with geographical compactness?

A. Yes.

Q. Wouldn't it be true, without reference to other studies you, yourself, would readily come to the conclusion this is not geographically compact under the current plan?

A. I would say relative to other plans, this plan appears to be less geographically compact, yes.

Q. Would that be true with respect to other plans in any of the other states you are familiar with?

A. I don't know about any of the other states, but it's true with respect to the states I looked at, specifically, and probably with respect to most states.

* * * *

TESTIMONY OF MELVIN WATT

April 4, 1994

• • • •

[918] Q. In your role as campaign manager, you had occasion to review the election returns for those elections?

A. Yes, I did.

Q. And, were you able to draw any conclusions about the percentage of white vote that Harvey Gantt received in those elections?

A. Yes, I made a detailed analysis every time a campaign was over, the vote breakdown by precinct, by race and used very conservative assumptions. And I can tell you that Harvey Gantt, despite his popularity in Charlotte, never got 50 percent of the white vote in any election that he ran in.

Q. Now, turning to his 1990 senate campaign, what factors influenced Harvey Gantt's decision to run at that [919] time?

A. Well, obviously, he's a very impressible guy. He called me one day said, look, I feel I'm qualified for this position, as he told me back in 1979 when he decided to run for mayor. And I kind of looked at him and thought he was crazy. He said, I feel like I'm better qualified than the person I would be running against and basically then we started looking at the numbers to see if it made any sense at all.

Q. Did race play a factor in that campaign?

A. Yes. I think it played a factor in a number of different ways. First of all, we got a lot of really hateful mail and phone calls. We got death threats from a group that purported to be the Ku Klux Klan who threatened to blow up a restaurant in which Harvey was speaking.

We got very concerned, without creating a public perception of concern for Harvey's safety.

When Harvey would run, he liked to run every morning, and my son insisted on going out with him at 5:30 in the morning to run. All of those things were basically in response to that kind of atmosphere that was being generated, and we were making every effort we could to try to keep that from being the focus of the campaign. But we were certainly aware every day of that campaign of what we perceived as a physical risk, based on calls that we were [920] getting.

I think the Helms campaign went out of its way to try to capitalize on the dichotomy of races in the campaign.

They did one commercial that focused on me as the campaign manager and distorted my appearance and distorted my voice and implicitly was saying to the public that this was a black operation; the campaign manager was black, the candidate was black and everybody else in the campaign was black, so to speak.

And then, of course, there was the what we called the white hands ad near the end of the campaign, which connected economic and job insecurity of white people to this racial distortion and a distortion of Harvey's record on quotas.

And I believe the Helms campaign also distorted Harvey's voice and appearance on occasion in its commercials, so there were a number of incidents during that campaign that were race related.

• • • •

[922] Q. Now, in 1990, do you recall any other incidents that occurred during the campaign that affected black voters?

A. Yes. The Republican party engaged in what was called the postcard campaign, which was a mailing directed to black voters suggesting that if they had moved

their residence from the residence that was listed at the boards of election, that they would be criminally prosecuted if they tried to vote. That postcard campaign was massive and diverted a lot of the campaign's time and attention.

I ended up having to assign somebody almost full time to respond to people who were calling to express concern about whether they could vote or not to vote and to deal with how you transferred your registration. And I believe it had a substantial impact on black voter turn-out in the final analysis.

Q. Now, did you actually see any of those postcards?

A. Yes, I did.

Ms. Hodgkiss: May I approach, your honor.

Judge Phillips: Yes.

Q. I'm going to show you what's marked for identification as Exhibit 523 ask you if you can tell us what that is.

A. Yes, this is one of the postcards that was mailed out by the Republican party and it says at the bottom, paid for by the North Carolina Republican Party, and I believe [923] subsequently they entered into a consent order in some legal context, agreeing not to engage in that kind of conduct anymore. But, of course, that was after the fact and after the campaign was over, and after it had the impact of diverting of resources and reduction in voter turn-out.

* * * *

[928] Q. And you mentioned earlier that you had pushed the boards of elections to get you lists of voters in the district; were they able to do that?

A. Yes, they were able, I guess, before the primary. Well before the end of the primary, the boards of [929]

elections were able to provide print-outs and mailing labels from most counties of every registered voter in the 12th congressional district. They could give it to us by race, they could give it to us by age, by sex or gender. And so we took that information and tried to figure out what made sense in terms of a direct mail campaign.

We started using the personal contacts that we had made to tie ourselves to the community leadership throughout the congressional district. And, in a lot of cases, we got them to write letters of endorsement that were localized and directed to constituents that they historically dealt with and basically did what we had done in every political campaign that I had managed or been a part of, and that was look at what made common sense in terms of how you run a political campaign.

By that time I was aware — every campaign that gets conducted is a different animal, so to speak, and you have to look at what the challenges are, what the demographics are, and what makes sense for conducting a campaign every time you start to conduct one.

Q. So how did the shape of District 12 affect your campaign?

A. I don't think it really had any impact on my ability to campaign. The access to the district was extremely good. If anything, it helped me because I was as young [930] and energetic as any of the other candidates and we set up an aggressive schedule of personal appearances. On some days we could hit five or six parts of the district in the same day, and when I announced my candidacy — in fact, I started in Durham. I had a press conference in Alamance County, in Burlington; I had a press conference in Greensboro; I had a press conference in Davidson County; and then I had a press conference in Salisbury and Rowan County; and I had a press conference in Charlotte in Mecklenburg County. And then the next day we had press conferences in

Gastonia, Davidson County and Iredell County. So I covered, just in the announcement process, the entire district.

It's just something that we had to do if we were going to conduct a campaign, and it's really no different than if I had been conducting a much more localized campaign. You would try to make stops in every part of your city council district, every part of Charlotte if you were running for mayor. You've got to make the effort to connect with voters wherever they are, and that's just characteristic of running campaigns.

• • • •

[932] Q. Can you tell us more specifically what types of issues that urban Piedmont is concerned about?

A. Well, I deal a lot with jobs and economic issues, credit access issues, housing issues, ownership and low income issues, transportation and infrastructure issues, banking issues.

In fact, there are more banking interests in my congressional district than any other congressional district in the United States, except the congressional district represented by Carolyn Maloney; she represents the Wall Street area of New York.

So, there are a lot of common issues that I have to deal with, and being able to focus my energy and efforts [933] on those common issues, I think, is a benefit to urban areas.

Q. In addition to banking institutions, are there any other institutions that are concentrated in the 12th?

A. Yes, I have six of North Carolina's 11 historically black colleges and universities. Johnson C. Smith, Livingstone, Winston-Salem State, A&T and Bennett and in Greensboro and North Carolina Central in Durham; all six of those are in my congressional district.

The bulk of the rest of them are in Eva Clayton's district. As a result of that, we had a big grants workshop where we were able to get representatives from most of the federal agencies to come to Durham for a combined grants workshop where those colleges and universities could address those issues that they have in common in one forum, rather than being split out all over the place.

I have a number of other wonderful educational institutions located in my congressional district; community colleges that I have spent a lot of time cultivating and helping with their resources.

Most of the housing authorities for these cities are located in my congressional district. We've done a lot of work with them in helping them process and package grant applications. Mecklenburg County Housing Authority got [934] the biggest grant for rehabilitation of low income housing community that has been received in North Carolina during my tenure. I mean, I guess I could go on and on, but I want to stop.

Q. Let me ask you, then, what committee assignments do you have in congress?

A. I serve on the Banking, Finance, and Urban Affairs Committee. I made the commitment to do that, or to seek that committee assignment during the course of my campaign, because it deals with urban issues, has oversight over the Department of Housing and Urban Development, and it also deals with banking issues, both interest that the banks have primary focused interest in and issues that the community has a lot of interest in, such as Community Reinvestment Act and community development banking and enterprise zone legislation. So, I serve on that committee.

I also serve on the Judiciary Committee, which is the committee which deals with all of the crime legislation, which is an area that my congressional district has a lot of interest in. As you might imagine, it's — the highest

crime impact areas of North Carolina are in my congressional district. It also — that committee also deals with bankruptcy jurisdiction, the federal courts, which I'm able to use my legal background with, and it [935] also has dealt with the telecommunications issue, the question of access of long distance and the Baby Bells and Mama Bells and issues of that kind.

And finally, I serve on the Postal and Civil Service Committee as a temporary assignment. And that committee deals with federal employee issues and postal employee issues. Next to David Price's district, I have more federal employees and postal employees than any other congressional district in North Carolina.

Q. Are there any issues in congress that you have taken a special interest in that relate to the nature of the 12th district?

A. Yes. I have been very active in housing issues, in particular with the Department of Housing and Urban Development. I serve on the housing subcommittee of the Banking, Finance and Urban Affairs Committee. I have been active in consumer issues. I serve on the consumer subcommittee of Banking Finance and Urban Affairs. I have been very active in CRA issues, Community Reinvestment Act issues, because what we're trying to do is draw a proper balance between the banks and the community, and the banks' responsiveness to the community.

So I'm constantly walking that line between communicating the banks' interest to the community and communicating the communities' interest to the banks. I [936] have been very active in community development banking issues.

We've passed a community development financial institution legislation and I sent out copies of the legislation and summaries of the legislation to a lot of banks

and community groups asking to get their comments bank so I could be an effective advocate in that area.

I have been extremely active in enterprise zone, empowerment zone and enterprise community legislation; that's what it's called now. I have sent out information that enables all of the cities throughout my congressional district to get in the forefront of applying for enterprise community status, which would allow them to cut through some of the bureaucratic red tape at the federal level, and also access additional impact funds that would be more beneficial to urban areas.

I've also been a very active player in the crime bill in the Judiciary Committee in helping to shape that crime bill in a way that I hope will be responsive to the need to reduce crime. And I have been very active in telecommunications issues as a result of my service on the Judiciary Committee.

Q. I want to turn now to ask you how you communicate with your constituents. How do you reach the voters in the 12th district?

[937] A. Well, first of all we sat down with — we tried to get a staff together that is reflective of both the racial make-up and gender make-up of the congressional district. I have a very diverse staff. I have staffed local offices with people who are residents of the areas that they work in throughout the district.

In Durham, I have a person who — I have a fixed office in Durham and I have a person from Durham who is the constituents services person there. I have a fixed office in Greensboro, and I have two people who are residents of that area who do constituent services there. I have a fixed office in Charlotte and I have people there who were originally residents of Charlotte. I also have a mobile person who, on a regular basis, on a regular fixed schedule, goes to hold office hours in municipal buildings in Gastonia, in Mooresville and Statesville in Iredell

County, in Salisbury and Spencer in Rowan County, in Lexington and Thomasville in Davidson County, in High Point in Guilford County, in Haw River and Burlington in Alamance County. And that person's job is to service those communities where we could not afford to put fixed offices. And then we service Forsyth County, the Winston-Salem part of the district out of the Greensboro office, and also out of a fixed office which the city of Winston-Salem has provided to us in the community in [938] Winston-Salem.

One of the people from the Greensboro office goes over there two days per week. So that's the way we try to make service conveniently available.

I have a policy in my office which I continued from my law practice where if somebody calls in, they don't even get asked who's calling, as most folks do. If they call for me and I'm in the office and not on another call or in conference with someone else, the call is put directly through without them even asking who's calling. So I spend a lot of time talking to surprised constituents on the phone who never thought they would get to talk directly with me. My staff follows the same policy and that's worked out very well in terms of providing access. I do a — I have an advisory committee.

Q. Would you turn to Exhibit 517?

A. Yes.

Q. And would you identify for the record what that exhibit is?

A. Exhibit 517 is a county-by-county breakdown of the advisory committee members and the population percentage of each of those counties in the congressional district and the population percentages of the membership on the advisory committee in each of those counties.

I think we have 496 members of our advisory [939] committees. They are scattered basically geographically throughout the congressional district. I think about racially it's about 55 percent black or 53 percent black, 44 percent white and the rest is other ethnic groups.

Q. What is the function of the advisory committee?

A. The advisory committee's function is to receive information from us. We send a monthly newsletter that basically talks about the legislative issues that have taken place during the preceding month, grant possibilities that may be coming up or various federal programs, new programs that the community residents may want to be aware of. So we dispense that or disperse that information through the advisory committees.

Most of the members of the advisory committees represent organizations, and we have received commitments from them that they would take that advisory letter and copy it themselves or use whatever mechanism they can to disperse that information throughout their organization or their community or their church, if that's the case. And then we use them as a feedback mechanism.

We have actively encouraged them to solicit opinions of people in their respective communities or outside their respective communities, for that matter, and to give my staff and me feedback on what they're hearing about things to the people that people are concerned about, positions [940] on issues.

Q. Would you turn to Exhibit 516?

A. Yes.

Q. Can you identify that exhibit?

A. This is what we call a guide to constituent services. After I had been in office for almost a year and felt like

I had my staff and office locations in place and in a position to really be responsive to constituents in a way that I thought was effective, we did one mailing to every resident in the 12th congressional district, and that mailing is exhibit 516.

And basically what it does is tell constituents what kinds of things a congressional office can do. It talks about help with agencies, it tells them how to how best to bring a legislative issue to our attention, be specific, share your experience, include your name, address, phone number, so we can get back to you. It talks about visits to the nation's capital, what we can do to be helpful in getting White House passes and setting up tours and meeting with school students. It talks about accessing government documents. It talks about helping with passports, getting U.S. flags.

We had a blurb in here about the earned income tax credit, which we have done an extensive amount of education of our constituents about. My constituents are [941] the second lowest income constituents in North Carolina of the congressional districts. We found that a lot of citizens who were eligible for the earned income tax credit had just not filed the tax forms. So we've done an extensive education campaign about the earned income tax credit and how you — what forms you need to fill out, who can be helpful to you, because we thought that was something that residents in a basically a lower income congressional district would want to know about.

This newsletter talks about how you get presidential greetings on special occasions and what help we can be with that. Talks about summer interns, service academy nominations, has a list of information hot lines that people can call and then it has a listing of our fixed offices and our satellite office schedules that I've just testified about.

My thinking, basically, was that this is a congressional district of people who really have not felt like they had access to their government, and so we have tried to go the extra mile to let people know that our offices are their offices, and that they should try to use our offices as a resource to cut through federal red tape and deal with their government.

Q. Would you turn to Exhibit 520?

A. Yes.

[942] Q. Can you just briefly describe for the record what that exhibit is; what the information is?

A. This is a mail report that our computer — the computers in our office generated which basically tells the kind of letters that we have written by county and by subject matter.

The first page is a summary page that indicated that, as of the date that this was done, which was about two or three weeks ago, I guess, we had generated a total of 5,630 letters out of my congressional office to constituents in the 12th congressional district. We had generated additional correspondence inside North Carolina and outside North Carolina. So the first page just gives a compilation of that. And then the subsequent pages gives a county-by-county breakdown of the number of letters that I have written and the subject matters that those letters have covered, based on the information generated from my office word processing computer.

Q. And would you turn to Exhibit 521?

A. Yes.

Q. Just briefly, tell us what that exhibit is.

A. This is a county-by-county breakout of the constituent services cases that we have processed through our office. The ones that have been opened and closed, as well as the ones that are still active, and the

subject [943] matters those constituent services have covered from, based on categories that we maintained in our office.

Q. And do you have any way of determining the racial breakdown of the constituents that you provide these services for?

A. Nothing other than visual observation. We don't keep a written record of constituent services by race. But based on my own visual observation and my staff's visual observation, we believe that it is the race of the people that we serve for constituent services essentially consistent with the racial composition of the congressional district. And, if anything, that we do probably slightly higher percentage of white constituent service work than we do for the black residents. But that's based on who comes in and asks us to do something.

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[948] Q. Now, finally, I want to ask you how accessible District 12 is; how easy is it for you to get around?

A. I'm the envy of other members of congress. I mean, I don't know of any other member of congress who can fly into the northern end of his congressional district and land into Raleigh-Durham or fly into the middle of the district and land in Greensboro or fly into the southern end of the district and land in Charlotte.

[949] When I come home to Charlotte every time, almost every time I get off the plane, there's some other congressperson going to Tennessee or Alabama or South Carolina, and I'm at home before they even get their next flight because Charlotte obviously is the U.S. Air hub. Raleigh-Durham is the American hub, so a lot of folks fly through that airport. And then Greensboro is kind of the Continental low fare center out of Baltimore, if you want to fly in there, and I have regularly been able to fly into various parts of the district.

In terms of road access, I can get anywhere in my congressional district within three hours, even staying within the speed limit. So I really think it's one of the more accessible congressional districts in terms of being able to get to constituencies of any that I'm aware of.

Q. And do you know how voters in your district learn that they are in the 12th district?

A. Well, the boards of election in each of the counties, with the exception of Rowan and Iredell, have sent out cards to everybody telling them what congressional district they vote in. And some of them did that — I know Mecklenburg and Guilford and Durham did it before the first election; some of them have done it subsequent to the first election. But I think everybody knows now what congressional district they are in. Every one of my [950] constituents has now received a copy of the constituent services guide, which has been introduced as an exhibit. And I certainly get regular telephone calls and correspondence from them.

• • • •

[967] Q. Yes. Mr. Watt, did you become aware of the fact that, according to this poll taken in October, November 1993, only 6 percent of the respondents knew that you were their congressman?

A. Yes. I had been told that that's what the poll reflected. I didn't have any knowledge of it other than being told by legal counsel in this case.

• • • •

[985] Q. Has it been your impression that where a black candidate, at least a black Democratic candidate, is involved, the vote by African-Americans has been very cohesive in favor of that candidate?

A. Yes, although I would hasten to say that, at least in Gantt's first mayoral race, given the very narrow mar-

gin, there was at least some possibility that the black vote was decisive, but not being completely cohesive.

Q. In his later campaigns, was a black vote cohesive for Mr. Gantt?

A. Yes.

Q. And in the senatorial race, was it cohesive in Mecklenburg and everywhere else, that you are aware of?

A. Certainly substantially cohesive, yes. I couldn't say, for example, that every black person who voted, voted for Gantt, but I think there was a substantial amount of cohesiveness, yes.

Q. Would 95 percent be a reasonable estimate at least?

A. Yes, probably.

* * * *

[995] Q. Now just a few final questions, Congressman Watt. Do you remember being interviewed on the McNeill-Lehrer program on television for a interview by Kwame Holman?

A. Yes.

Q. Did you see the program on Tuesday, March 29, 1994, when it aired or videotape thereof?

A. No, I didn't.

Q. Let me ask you this. If is this a correct summary of remarks you made to Mr. Holman. Obviously I don't want to call justice of the Supreme Court racist, but the logical extension of what she was saying is that a 55 black district which happens to be 45 percent white is racial gerrymandering is racial apartheid, yet a 90 percent white district which is 10 percent black is somehow integrated, it didn't make sense what she was saying except in some historical — and I would characterize that as racist; is that a correct rendition of the comments you made to Mr. Holman?

A. Essentially, yes. I have said and believe that some of the assumptions on which the Supreme Court's opinion in *Shaw v. Reno* is based are racist assumptions, and I have [996] said that, and still believe it.

I have also gone out of my way on each occasion that I have said that to say that I am not calling a member of the court racist. I really have more respect for the court than that, and I think you will find if you go back and look at my public statements, that I am probably the last person in the world that would call somebody a racist.

I believe there are racist opinions which are based on a lack of information, and racist assumptions that people make that are based on a lack of information. And when you inform those people with the facts, they revise themselves and they revise their opinions.

And I expect if you followed that interview all the way through, I expressed confidence at the end of the interview that if they played it all, that I thought the same would occur with the justices on the Supreme Court.

I think that's what this trial is about at one level, to attack those assumptions, so that when the case does go back to the Supreme Court, the court can make their judgments with information. And I was delighted to hear one of the witnesses say that, in fact, the 12th congressional district is the most integrated congressional district in the country, and I think that is directly counter to the Supreme Court's assumption, which [997] suggests that an 80 or 90 percent white district can somehow be integrated yet a 55, 45 percent black district is racial apartheid.

Q. Let me ask you this. Is it your belief that it's entirely appropriate to draw lines for congressional districts with a specific purpose to assure that African-Americans have a majority registered voters, regardless of whether they are geographically compact?

A. Against a more than 90-year history of racially polarized voting that makes it impossible for a black candidate to be elected, I think as a temporary measure, this is something that is both desirable and legally required and constitutional.

Q. By temporary you mean something that would last into the next century; is that correct?

A. Well, every recount, every census lasts ten years. I think ten years from now or ten years from 1990 the legislature — it would be incumbent on the legislature to look at it and make a determination of whether it was still necessary, given where we are in history, to continue to draw districts this way.

But right now, I can tell you that my experience is that in the absence of majority black districts, no black person is going to be elected to congress from North Carolina. And I think that would be unacceptable if South [998] Africa, for example, came forward with a plan that excluded or made it impossible for whites to be represented in their democratic process, and I think it should be unacceptable in this country.

Q. So it's your testimony the only way that you view it to assure the election of the African-American, one or more African-Americans to the congress, is to create majority black districts?

A. At this juncture in history, yes.

Q. In that connection, would it also be true then, it's your view that traditional redistricting principles such as contiguousness, geographical compactness, political subdivision, should be discarded, if necessary, in order to create majority black districts?

A. Well, my tradition, Mr. Everett, that I value more than anything else, is the tradition of democratic representation, and I value that over the traditional principles that you have articulated. And I think our

democratic society should value that, and does value it, and that's what the Voting Rights Act is about, and to some extent, that's what the constitution, hopefully, is about.

Q. Now, in that same vein, have you stated at panel, which was videotaped, that I'm not sure that a black person representing a majority white district would have [999] had the freedom of voting against NAFTA?

A. Yes, I've said that.

Q. Is that still your opinion?

A. Yes. I mean, it's basically consistent with what I was saying before. If you represent inconsistent constituencies, it is more difficult to represent those inconsistent communities of interest.

And I expect, had I been representing more of the corporate interests, which is what you would have gotten in historical pattern of the way congressional districts are drawn, I would have either had to change my view on that or I would have been out of step with the majority of my constituents on that issue and that's the context in which I made that statement.

Q. Did you, in the same context, say that it adds to the debate to be able to bring up a perspective without catering or having to cater to the business or white community?

A. Yes, sir, I made that statement. I can give you many examples of it. Most recently, this week, when I met with a banker. He pointedly asked me the question if comes down to voting my interests as a banker or voting what you perceive to be the communities of interest in your district and those two things are at odds with each other, I want you to tell me you are going to vote with me.

[1000] I looked at him and said, sir, I can't tell you that. I will tell you that I will consider your opinion, I will listen to you, I will allow you to persuade me, and if I believe that you are right, I will vote with you, with your interests.

But my interest, representing the constituency that I represent, and I would tell you, Mr. Everett, I would never have been able to make that statement in the context of the old 9th congressional district. And so again, that's an example of the difficulty.

Now, I want to hasten to tell you that that doesn't mean that I don't have to compromise. I probably end up compromising and walking the line between the business community and the community a lot more than most people do, and I try to do it with integrity, and I try to do it as I believe I should do it.

But I would be in a completely different situation, in my opinion, if I represented a district like the old 9th and that's really what I was saying to you or in response to the question on direct, as to why I would not have run.

I consider myself a very principled person, much less so a political person in the sense that I am always trying to figure out the way the political winds are blowing. And representing a district that you are consistent with [1001] in your philosophies, allows you to be consistent in voting your conscience without buckling under or catering, as you said my statement said, to other interests that may not predominate in my district.

Q. Basically you seek to represent a constituency that's consistent with your particular view, is that it?

A. No, sir. I hope you don't misunderstand what I'm saying. I think I tried to articulate it as best I can. It's a lot more comfortable for any politician to represent a constituency that his or her personal opinions and views are consistent with.

Q. Now, have you also stated that you feel that drawing districts the way we have discharged to draw them channels representation toward the middle?

A. I think I gave that answer in the context of some theoretical question about proportional representation which — but I don't know that. Ask me the question again.

Q. Okay. Asking this. Do you feel that districts, the way that we historically draw them, channels representation toward the middle?

A. To some extent it gives the middle all the power, so to speak, and both conservative Republican interest less ability to be heard, and more liberal interest less ability to be heard, and all of that, I think, is [1002] important in the context of a democratic society. I mean, I think we need to hear all the views. That's what democracy is all about.

Q. In that context, did you say this is a consensus and coalition kind of things, and to do that you systematically exclude the extremes, both the conservative and liberal extreme.

A. I believe the context I said that had to do with a condition of proportional adaptation.

Q. Do you feel special duty or responsibility concerning African-American citizens in a district other than the 12th district?

A. In the same sense that I feel a responsibility to white citizens who are not in the 12th district. My responsibility is to consider all of the input that I get on a particular issue and to act with integrity and make a judgment based on all the facts.

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TESTIMONY OF ARTHUR POPE

April 4, 1994

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[1025] Q. Mr. Pope, could you please explain to the court the extent to which you participated in the redistricting process in North Carolina during the 1991/92 redistricting cycle?

A. My participation actually began 1990, when I was a member of the North Carolina House of Representatives and the North Carolina General Assembly first started distributing information —

Judge Phillips:: Speak up a little bit.

The Witness: My participation actually began during 1990, I was a member of the state House of Representatives 1989-90 session, it was in 1990 that the [1026] General Assembly first began distributing information on the redistricting process and holding meetings and briefings on that. I attended the meetings whenever I could, and started keeping a file on redistricting materials.

During '91, I asked for an appointment from Speaker Dan Blue to be a member of either the Congressional Redistricting or Legislative Redistricting Committee, and was recommended by Representative Jonathan Ryan, the house minority leader, to be appointed to those committees.

I didn't receive that appointment to either of those committees, however I continued to attend as many of the public hearings and committee meetings on redistricting, both legislative and congressional, that I could.

I sought training on the redistricting computer, initially under the rules laid down by the president pro tem and speaker, I was not entitled to training on the redistricting computer but they later changed those

rules, and I was able to take that training and received it.

I drew numerous plans doing legislative redistricting, primarily in the state house, and state senate districts, and directly assisted representative David Balmer in the preparing of plan that ultimately became Balmer 6.2, at the time he was not trained to the computer.

[1027] I continued to collect files and information from committee handouts on the legislative sessions, regular session, and special session during 1991-92.

Q. Mr. Pope, I'm holding in my hand Exhibit 200, which the parties stipulated as the legislative history related to both Chapter 601 and Chapter 7.

Have you ever reviewed the legislative history for either of those two acts?

A. Yes, I have. I was present during the creation of much of that history during the committee testimony, public hearings, during handing out of the bills, also reviewed the General Assembly submission to the Justice Department when that information became available at the General Assembly.

And I have, from time to time, reviewed it since then, in preparation and looking in the progress of this litigation.

Q. Mr. Pope, you have been in attendance in the courtroom during the course of this trial?

A. Yes.

Q. Were you here in the courtroom on Friday when Dr. Lichtman testified?

A. Yes, I was.

Q. With respect to the socioeconomic and demographic indicators about which Dr. Lichtman testified, do you [1028] recall any reference by any legislator to any of

those indicators during the discussions relating to redistricting?

A. I don't recall any reference to those indicators or factors, other than for the first time in January 1992, the house Redistricting Committee, the first mention of their meeting, the urban district being a factor, and that later being raised by Representative Fitch during the House floor debate on the enacted plan.

Q. Do you recall any reference during any discussions on redistricting as to whether districts were homogeneous or to the concept of homogeneity?

A. I never heard those terms used at all during either regular or special session of General Assembly, nor did I ever hear it with regard to any districts.

Q. Are you aware of any official policy on the part of the General Assembly or any of the redistricting committees to advance any of the following interests? The first one I'll ask you about communities of interest?

A. No. Communities of interest were discussed, I'm not aware of that ever being adopted or advanced policy as a policy the state should pursue. In fact, I was an advocated of having communities of interest included as a criteria for redistricting.

Unfortunately, the House hearing, House committee [1029] meeting on adopting criteria from the congressional committee was called on fairly short notice, and I was not able to draft anything to give to a member of that committee to propose. I did subsequently for the legislative criteria have time to give a community of interest criteria.

Ms. Smiley: Objection. I'm not sure what the legislative redistricting criteria has to do with this trial. He just indicated he didn't present anything on congressional criteria.

Mr. Farr: Your honor, he just explained his conduct that he attempted to get communities of interest added as criteria to the state house redistricting committee.

Judge Phillips: Is the objection not well founded, though, that the only testimony from Representative Fitch had to do with the criteria for congressional redistricting?

Mr. Farr: Your honor, we would suggest this goes to the argument that the General Assembly didn't consider communities of interest in context of any redistricting, was not interested in considering such a factor.

Ms. Smiley: Your honor, there was no testimony about the criteria that were adopted in the local and [1030] legislative redistricting by the Senate or House. And in fact, those are different criteria and we could look to submissions by the Senate and House for those.

I don't believe this is the subject of direct examination since we did not explore the differences between the criteria between the various redistricting plans.

Judge Phillips: Is there any testimony in the record to this point in any form about criteria respecting House and Senate legislative redistricting?

Mr. Farr: No, your honor, not that I'm aware of. And we're not purporting to go into that, your honor, we're attempting to make the point that the State, we believe, has come up with an after-the-fact justification for Chapter 7 relating to alleged communities of interest, and former Representative Pope's testimony, we believe, will go to show that a majority in the General Assembly had no such interest in pursuing such criteria within any context.

The Court: We'll receive the evidence subject to objection.

Mr. Farr: Please continue.

The Witness: I did have opportunity in regard to legislative redistricting to draft a community of interest criteria which was offered in that committee and [1031] voted down.

By Mr. Farr:

Q. Were you aware of the policy or criteria related to a plan to enact an urban versus rural majority black district?

A. I never heard any discussion —

Judge Phillips: Is this congressional district?

Mr. Farr: Yes, your honor, thank you.

A. I never heard or knew of any proposal, policy or interest in creating urban black districts, or any urban congressional district until, for the first time, of the January, I think January 9th committee meeting of the House Redistricting Committee, was mentioned in passing or mentioned for the first time, I believe, by Representative Fitch. I believe Representative Fitch mentioned it on the House floor.

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[1041] Q. Mr. Pope, during the course of redistricting or related to Chapter 7, do you recall any discussion by Mr. Cohen, any General Assembly staff, or any legislator, concerning the idea that the congressional district should be created in some fashion to follow the North Carolina Railroad?

A. I never heard any such reference in North Carolina Railroad by Gerry Cohen or any other staff members in the course of redistricting.

Q. Mr. Pope, as someone who participated in the redistricting process, as a member of the General Assembly do you have an opinion as to what the purpose was of Chapter 7?

A. I think the primary purpose was to draw two black majority districts, congressional districts, where black were a majority of the population.

Q. Mr. Pope, in 1992, did you run for public office?

[1042] A. Yes, I ran for lieutenant governor of North Carolina.

Q. And in the course of that campaign did you travel the state of North Carolina?

A. Yes, I traveled about 50,000 miles in a 10-month period, visited just about every county in the state.

Q. Did you become aware of any confusion on the part of voters on about the congressional district they may have been located in under Chapter 7?

A. Yes. At campaign events, public events, general meetings, one of the most often asked questions I had about was about the congressional redistricting, both the original redistricting during the fall of '91, but primarily during '92, where people didn't understand the congressional districts, didn't know where they lived, didn't know which congressional district they were in.

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[1046] Q. One question, perhaps two.

Was your testimony that there was overriding purpose of the legislature in creating — enacting Chapter 7 to create two majority black districts?

A. Yes.

Ms. Smiley: Object to the form of the question, move to strike.

Judge Phillips: It's duplicative.

[1047] Mr. Farr: It's predicate to the next question, your honor.

Q. Could you state whether or not it was also a purpose to assure the election of two African-Americans to the United States Congress?

Ms. Smiley: Objection.

Judge Phillips: Overruled.

A. The purpose was to assign voters, by race, to two black majority districts in order to have the consequences of electing black African-Americans to congress.

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Q. And during the 1991 session, were you the head [1048] Republican joint caucus?

A. Yes, I was.

Q. What's the Republican joint caucus?

A. The Republican joint caucus consists of the house Republicans and Senate Republicans when we meet jointly.

Q. You were also a member of the North Carolina Republican party executive committee?

A. Yes, I was.

Q. And you were also a member of North Carolina Republican party central committee?

A. Yes, as the Republican joint caucus leader, an ex oficio member of the central committee.

Q. Didn't you, the Republican joint caucus, and North Carolina Republican party hire an attorney to advise you about preclearance of the first enacted plan, Chapter 601?

A. Yes. The Republican National Committee had on retainer the services of Bob Hunter, attorney. And the North Carolina Republican party, as part of the Republican party, hired Mr. Hunter to advise us.

Q. Isn't it true that you and the Republican joint caucus and the North Carolina Republican party and national Republican committee made a concerted effort to convince the United States Department of Justice to object to Chapter 601? A concerted effort?

A. I don't know that a "concerted effort" is the [1049] terminology I would use. David Balmer prepared an objection, I understand Bob Hunter prepared objection, and we encouraged people who might have cause to object to please do so. So I guess coordinated, or, I guess, concerted.

Q. So you hired an attorney or used an attorney paid for by the national Republican committee, who advised you in objecting to Chapter 601?

A. He was on retainer in advising us before we got to the stage of the enacted legislation of 601; he also advised us on the objection process.

Q. And isn't it true that you and the joint Republican caucus and the North Carolina Republican party encouraged people to write letters to the Department of Justice objecting to Chapter 601?

A. There was one specific occasion when we had a Republican joint caucus meeting when I informed the Republicans, or caucus members, saying this was an opportunity to file objection letters and if you know of anybody who's upset with the redistricting plan, the community leaders or whatever, encourage them to write objections.

Q. And didn't you have Mr. Robert Hunter arrange to meeting in Washington, D.C. with Department of Justice staff and attorneys?

[1050] A. I'm not sure we made actual arrangements, may have been Bob Hunter, but he was involved with us when we went up in October, I'm not sure, I can't recall

the exact date right now, to the Justice Department to object, in my case, about the North Carolina House redistricting plan. And in David Balmer's case, the congressional redistricting plan.

Q. Isn't it true that Representative Balmer sent lawyers to the Department of Justice objecting to Chapter 601?

A. That's my understanding, yes.

Q. And isn't it true you sent an objection letter to the Department of Justice about the State House plan?

A. Yes, it is.

Q. And isn't it true that you, and Representative Balmer, Senator Leo Daughtry, Senator Bob Shaw, flew to D.C. in a private plane to personally present objections about North Carolina's redistricting plans?

A. Yes.

Q. House, senate and congressional?

A. Yes.

Q. Okay. And wasn't the basis of your objection that the State had only drawn one minority district in the congressional redistricting plan?

A. The basis of my objections to the Chapter 601, when I drew it, is that it was a badly gerrymandered district. [1051] The districts were odd shaped, that the State stated an argument that we ought to draw black majority minority districts in order to comply with the Voting Rights Act; yet, in fact, when they drew those districts, whether it was legislative redistricting or congressional redistricting, they only did so in a manner which would protect the white incumbent Democrats.

If a black majority district endangered a white incumbent Democrat, they would not draw them. And also, the one they did draw in the northeast was far more

bizarre shaped, long, totally lacking compactness, than the alternatives available that Representative David Balmer, in the Balmer 6.2, had drawn a far more comopact northeastern black majority district than in the enacted state legislation.

So my objection, my opposition to Chapter 601 was while we were under the guise of the Voting Rights Act, it could have been done, it could have still created just one or two black majority districts for more compact, with far more respect for governmental subdivision, such as counties and cities, and the surrounding districts could have been far more compact, more respectful of governmental subdivisions like counties and towns.

Q. So, isn't it true that you objected to Chapter 601 and to the state House plan and the Senate plans because [1052] you, the Republicans, felt that North Carolina should have drawn more minority districts in the house plan, and the Senate plan, and in the congressional plan?

A. The Republican party, this time you asked about the Republican party. The Republican party, there was never any vote. You asked me this during the deposition, there was no vote by the Republican caucus, joint caucus or house caucus, Republican executive committee, Republican central committee, on a strategy or plan takes to how the district should be drawn or objected to.

And again, what I discussed with my colleagues, discussed with Democrat House members, were if the ground rules being laid out on the advice of the General Assembly staff, including Gerry Cohen, Leslie Winner, not to quote them indirectly, but the committee chairmen, that we should draw majority minority districts where possible, that should be done on consistent basis.

It was my opinion and belief, then and now, especially in the state House redistricting, which I worked on, as well as congressional redistricting, they only drew the

black majority districts when it did not endanger a white, incumbent Democrat. And that was not a proper consideration.

And what Representative Balmer tried to do in the congressional, and what I tried to do in the House, was [1053] show there were other areas in the state where you could draw majority minority districts, or black majority districts, which were as compact, if not more compact, than the districts that the leadership drew and ratified in the House and congressional redistricting but refused to do so because to do so would have risked or endangered the white incumbent Democrat or increased opportunities for Republicans in the adjoining districts.

My position, which I stated in committee, during General Assembly session, as regard to the consequences, if you are going to go by the rule, draw a black majority district regardless of the consequence of creating a Republican joining district, or endangering a white Democratic incumbent because he would be in the black majority district or his old joined district and there will be more Republican leaning.

Those were not legitimate concerns. You should not draw the district that way. And that's what I talked to the Justice Department about regarding redistricting. I didn't sit in on Representative Balmer's meeting but I understood that was the gist, from our conversation, what his objection was. And, indeed, we partly cited by the Justice Department in their letter objecting to North Carolina first congressional plan in their first House redistricting plan.

[1054] Q. So isn't it true that you, Representative Balmer, Senator Leo Daughtry Senator Robert Shaw, all Republicans, went to D. C. and objected to the state House Senate and congressional plans because you said the State did not draw enough minority districts?

A. I think I said that, yes. We objected for many reasons, part which had to do with even the ones they did draw on the peculiar shapes, far more completely, not always, but lacking compactness, when they could have been drawn more compactly in other black majority districts.

If that's what you believe the criteria were, could have been drawn as well. There was debate among Republicans, among ourselves, to what extent the Voting Rights Act, the Gingles case required the creation of black majority district, as a matter of precedent, but given the ground rules, as I understood them at the General Assembly, you should draw them where you could but that rule was not consistently followed. It was only followed when not endangering a white incumbent Democrat.

But again, in drawing black majority districts, draw them according to race, but that was not done consistently. It was done haphazardly or in context of not endangering white incumbent Democrats.

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[1056] at that public hearing that Representative Ballance, appeared and spoke on behalf of the other Republican congressmen from the state of North Carolina?

A. Sitting here right now today, I don't have specific recollection of his comments.

Q. Do you recall hearing those comments from your Republic congressman on another occasion or in the press?

A. Again, I don't have a specific recollection. I'm not saying they didn't say that; I don't have a specific recollection of it.

Q. Did you file a lawsuit, *Pope v. Blue*, alleging Chapter 7 as partisan political gerrymandering?

A. In shorthand terminology, yes.

Q. And in that lawsuit, did you not file an affidavit that was attached to the complaint?

A. Yes, I did. Wait a minute, I don't know it was attached to the complaint. I think it was filed subsequently but I'm not sure.

Q. But you do recall signing an affidavit in that lawsuit?

A. Are you are talking about verification to the complaint or affidavit?

Q. I'm talking about an affidavit?

A. Yes, I did file an affidavit subsequent to, during the course of litigation or —

[1057] Q. And in that affidavit, did you indicate that you believed that the changes made after '92 Congress I by the Democratic leadership and ratified by the General Assembly, Democratic majority in 1992 Congress based number ten, were not necessary to comply with the Voting Rights Act; in fact, were made with the intent and had the results of protecting the Democratic incumbent congressman?

A. I believe that many of the changes and did, in fact, have to do with protecting the Democratic incumbent. In fact, some of Gerry Cohen's testimony I heard during this trial confirmed that, especially, as I said earlier, taking the Democratic precincts, putting them in the 5th district. Taking the Republican districts outside of the 5th, putting them in the 10th. So while the first and 12th district concerned racial gerrymandering, a lot of the other odd shapes and where the first and 12th were located, how they were drawn, considered parts of gerrymandering.

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[1058] Q. I believe you indicated that it was not necessary — that the changes made by the General Assembly were not necessary to comply with the Voting Rights Act. In fact, were made with the intent and had the result to protecting the Democratic incumbent congressman. Is that what you had sworn to?

A. I said on information and belief, including to but not limited to the summaries of the Supreme Court, attached thereto as Exhibits B, C, D, I believe the changes made after the '92 Congress I by the Democratic leadership and ratified by the General Assembly Democratic majority 1992 congress base 10, were not necessary to comply with the Voting Rights Act.

[1059] The important part here, I see before me, the changes made after '92 Congress I. '92 Congress I included the two black majority districts. That was the Merritt-Peeler plan that was loaded into the computer and presented to the committee.

I believe most of the changes made between the Peeler plan's two black majority districts and enacted plan were, in part, due to political partisan gerrymandering. The Balmer 8.1, the Peeler plan both show that two black majority districts could be drawn by using race as criteria rather than using those districts and placing them where there were past allegations or proof or claims that there had been racially polarized voting or there was a large population of black populations such as for the Justice Department referred to from Charlotte to Wilmington, was put up I-85 from Charlotte to Durham.

Then, as Gerry Cohen testified, even after he got the basic I-85 district from Charlotte to Durham, they moved part of it further west out of Rowan and I believe Cabarrus County over on Iredell County in order to protect Congressman Hefner.

In turn, they included blacks in Winston-Salem out of Neal's district. They had to replace those with Democratic precincts to help Congressman Nettles, which Gerry Cohen also testified to.

[1060] So yes, after the two black majority districts were proposed in the Peeler plan, which I believe were drawn on the basis of race, most of the subsequent changes were done for partisan gerrymandering purposes, as I stated in the affidavit.

Q. Didn't you go on, in paragraph seven of the affidavit, and didn't you swear that the convoluted shapes of the congressional districts were necessary to pack Republican voters and citizens to extort the vote of Republican into the 6th, 9th and 10th congressional districts?

A. The convoluted shapes of the 6th, 9th and 10th congressional district.

Q. Middle of paragraph seven.

A. Yes. Those districts, you could have drawn a black majority district and still had more compact 6th, 9th and 10th congressional districts. Again, you couldn't draw the I-85 district either in the Peeler plan or '92 Congress I or in the enacted plan, and have a compact district.

Even after drawing an I-85 district stretching from Gastonia — first Charlotte, Durham and Gastonia, Charlotte, Winston-Salem to Durham, you could have gotten more compact districts.

Representative Balmer, in his alternative, drew [1061] fairly compact districts around the non-compact, the very long shaped black majority districts or majority minority districts. So yes, I say that and I believe it now.

Part of the reasons that those districts, the 9th and 10th districts are so odd shaped, they were packing Republicans in there, were taking out the blacks out of

the Democrat leaning districts and putting them in the black majority district.

Q. In paragraph seven, is African-American or black ever referenced?

A. This lawsuit concerned parts of gerrymandering, so I was giving this affidavit with regard to the parts of gerrymandering after, especially when you referred back to the first paragraph, after '92 Congress I, the Peeler-Merritt plan was introduced with two black majority district. This affidavit does not address that issue; that paragraph does not.

* * * *

[1062] Q. Now, in your deposition, didn't you attribute a large number of the irregular shapes to partisan gerrymandering?

A. Yes, particularly in the western part of the state.

Q. Only the western part of the state?

A. No, particularly in the western part of the state. I think large part of the explanation of why the eastern 1st district was drawn so irregularly, you had the crossovers in the 3rd district and the way the 7th district was shaped, starts up again drawing the racial districts. The black majority 1st district, how that particular district [1063] was drawn, there was several alternatives. And how the white majority district was drawn around it was due to the partisan effect. I believe we went through that in the deposition.

Q. Didn't you testify in the deposition that, in fact, the intermingling of the 7th and 3rd was to help Congressman Rose and Lancaster, the partisans?

A. I believe that was part of the reason.

Q. You testified there were heavy concentrations in Onslow and Carteret counties that were deliberately split between the 3rd and 7th district for partisan reasons?

A. Without having the deposition in front of me, my recollection was I thought that might be the case. I don't know that was the case. I didn't have the detailed concentrations nor could I tell from the maps that we were using, which were basically eight and-a-half by 11 size, exactly where the lines were. I thought that was the case. I have not looked at it in detail since then, the blow-ups of the areas or bigger maps. So I'm not sure but I thought that was the case.

Q. Are there Republican concentrations in Carteret and Onslow county.

A. I do know, from looking at state wide vote returns and knowing there was elected in the areas large concentration of Republicans in those areas.

[1064] Q. If those concentrations in Carteret and Onslow county were split, would you consider that fracturing of Republicans?

A. Well —

Q. Fracturing Republican votes?

A. It depends on partly why they were split, I mean — felt that they were two separate counties, I think you should — you should follow county boundaries when you can. If the reason they were put in separate districts was because they were in separate counties, and they said we need one-man, one-vote without split counties, there could be reasons not to do it.

Looking at the map, you can't tell from this big map — seems like most — I can't tell from that map, sorry. You want —

Q. Why don't we move on to another district. With respect to the 4th district, haven't you previously testified that Republican concentrations in east Durham and northwest Wake County were split to fracture Republicans?

A. My house district is in northwest Wake County. It goes up to the Durham County line. And there are some similarities, I don't argue there are communities of interest between northwest Wake County and the eastern part of the Durham County. Besides the geographic [1065] overlap, it showed the Falls Lake watershed areas, showed transportation concerns, and those precincts do vote Republican

So, a natural fit to include them together, other than deliberately choosing to respect county lines. They did choose to respect county lines because at least one of the precincts just north of the new light precinct was included in the 2nd district; the remainder included in the 4th district.

Q. So your testimony now would be that east Durham and northwest Wake were not split to fracture Republicans?

A. I didn't say that. It is, again —

Q. Could you answer my question. Have you, in fact, testified previously or —

A. I stated that was my belief then; it's my belief now.

Q. Thank you. Haven't you also previously testified the 2nd district was wrapped around the 4th district to split Republicans between the 4th district and 2nd district?

A. Yes, I have.

Q. And you also testified that the 2nd district made a C around the 4th district to keep Valentine out of the 3rd and 4th district and to piece together enough voters for Valentine?

A. I believe I said inverted C, since the C goes the other way. Yes, I did.

[1066] Q. With respect to the 8th district, haven't you previously testified that Republicans in Rowan, Stanley, Concord, Kannapolis, and parts of Davidson were submerged in the 8th district?

A. Without having my deposition in front of me, I probably said that, yes.

Q. Do you now believe that?

A. I believe it, yes.

Q. Okay. Haven't you also testified previously that Moore County is almost majority Republican, and it was submerged in the 8th district?

A. Yes, I think I said I wasn't sure whether it was partly split or not. From looking at it right now, it was partly split up, I believe. Yeah, it was partly split up and part submerged under the in the 8th.

* * * *

[1067] Q. Haven't you also previously contended that Republicans were packed into the 6th district to help Congressman Neal and Congressman Hefner?

A. Again, I don't have that deposition in front of me; yes, I believe that's the case.

Q. Do you believe that — do you recall previously testifying about the self-interest of legislators that occurred in the redistricting process?

A. Yes, I do.

Q. And do you recall testifying that Senator Ballance wanted Warren and Vance counties out of the 12th district and into the 1st?

A. I recall that, yes.

Q. And you also previously testified that under the Peeler plan and Hardaway's plan, Hardaway had the 1st

to himself since Warren and Durham counties were in the 12th district?

A. That was my understanding. And that's correct, because Representative Michaux was in Durham County, which I believe at that time was — would be under the 12th district also.

Q. Didn't you previously testify about a plan you created for the house, Wake County House district, that [1068] you believe would make the Wake County House district more compact?

A. I testified it would make them both more compact and lower the total deviation about four House districts that were involved.

Q. And isn't it true that Representative Fitch refused to make that change when you refused to support the plan in return?

A. They were talking about House Redistricting Plan, yes, that's true.

Q. Okay. And Mr. Pope, in your deposition, didn't you conclude that partisan and racial gerrymandering were intricately related in drawing Chapter 7?

A. What I concluded and what I stated was, you start off with a racial gerrymandering, because the first districts were drawn in order to create racial majority.

Then, how, the exact shape and where they were located in the state, Charlotte to Wilmington versus Charlotte to Durham, and the irregular shapes of districts and surrounding districts were made worse, and interrelated to the partisan gerrymandering. You start with the racial gerrymandering, and the political gerrymandering makes it worse.

Ms. Smiley: I have no further questions for this witness, your honor.

[1069] Mr. Stein: I have a few, your honor.

CROSS EXAMINATION

By Mr. Stein:

Q. Mr. Pope, Ms. Smiley asked you about the lawsuit of Pope against Blue, and I think you acknowledged that you verified the complaint in that case; is that right?

A. That's my recollection, yes.

Q. Do you recall stating in the complaint that, since the time of reconstruction through the present, Democratic party has been successful in its effort to exclude or limit blacks and Republicans from the state legislature and congress?

• • • •

[1070] A. In response to your question, yes, I do believe the complaint stated that, as I told you when you asked me this question during the deposition, I point out the counts beforehand. There was an exception to that period from reconstruction to the present, in 1896/1898 elections, where the Republicans and Populists together formed the Fusion Party. And for a brief while, had majority in the General Assembly and also elected a Fusion Popular Republican governor and Supreme Court.

That question didn't get made, I didn't catch it when I signed the verification.

• • • •

Q. Do you recall stating in the complaint also that [1071] blacks have consistently been underrepresented in the state legislature and no black has been elected to congress in this century?

A. I believe that's correct, because the last black was also the last black Republican elected from the east until 1966, that was Congressman George White from the northeast.

Q. And do you recall stating in the complaint that the majority has repeatedly and consistently fragmented or submerged black communities in order to enhance the election opportunities for white, Democratic incumbents?

A. That was done. I do recall that being in there, without having it in front of me to verify it now.

Q. I'm sorry, do you believe that to be true?

A. I believe historically that has been true in the past.

Q. Do you recall in the complaint, stating, in order to achieve its goals, the General Assembly adopted Chapter 7 at the request of one or more incumbent Democratic congressmen, or their staff, or agent?

A. I don't have a specific recollection. If you want to hand me a copy of the complaint to look at it, I believe I said that, but I don't have it memorized.

Q. Do you believe it to be true?

A. I believe that, the history, in fact, I believe that [1072] at least, in part, confirms this testimony of this trial.

Q. Do you recall stating in the complaint the districts established under Chapter 7 contain grossly contorted shapes with no logical explanation other than incumbency protection and the enhancement of Democratic partisan interests?

A. In the context of that lawsuit, yes. But that dealt with partisan gerrymandering. In the broad sense of Democratic interest, I think one of the key turning points when was when the Democratic incumbent congressman and Mr. Merritt, in his plan, showed that you could draw two black majority districts and protect the incumbent Democrats at the same time, and that was the beginning of what the Merritt-Peeler plan, was changes discussed in this trial became the enacted plan.

Q. Do you recall stating in your complaint, this denial and abridgement of plaintiff's constitutional rights has occurred because Chapter 7 serves primarily to further the interest of white incumbent Democratic congressmen and avoiding competitive elections, at the expense of the rights of those citizens living in the disfavored locations?

A. I think one of the key turning points was when they could protect themselves, their seat, including Walter Jones, Sr., and at the same time, added two black [1073] incumbent Democrats — and two black congressmen from the black majority districts.

• • • •

[1076] Q. And that, to your knowledge, was it not, the first plan that was developed and put out that created a majority black district that went from Charlotte, to the east, or Durham, to the west?

A. Yes, it is, to my knowledge.

Q. And of course, Mr. Balmer was the designated person in the Republican caucus to look after the interests of the Republican party with regard to congressional redistricting; was he not?

A. That's not the way I would phrase it. He was the designated person to monitor proposed plans for the Republican party — excuse me — for the General Assembly, as I stated early on, by pursuing fair and neutral redistricting criteria and consistently creating black majority districts where possible. Those were the groundworks we were supposed to have. I acknowledged that it did have an intervening program, and David Balmer acknowledged that it did have the tendency to create a joint Republican district.

• • • •

[1078] Q. Now, with regard to Gastonia, the inclusion of Gastonia, Representative Flaherty was a Republican, is a Republican member of the House of Representatives and was at that time period, was he not?

A. Yes, he was.

Q. And when the House, and when the General Assembly came back into special session during the session when [1079] they adopted Chapter 7, Representative Flaherty put in a two-district redistricting plan, did he not?

A. Yes, he did.

Q. And he had a majority black district, did he not, that ran from Gastonia to Durham?

A. I don't recall that. I believe what you say is true; I don't have a specific recollection of that.

Q. Well, do you recall being asked about that at your deposition?

A. You may have asked, and I don't recall, you may have asked me at the deposition. There I think we had copies of plans to look at when we were answering.

Q. Let me show you what is defendant's Exhibit 8 to your deposition, which has been —

Mr. Farr: Could I see that, Mr. Stein?

A. Okay.

Q. Could you just examine that and see whether or not that is a plan which provides for a majority black district going from Gastonia to Durham?

A. Yes, it does, District 12.

• • • •

TESTIMONY OF MELVIN SHIMM

April 4, 1994

• • • •

[[1084] Q. Professor Shimm, are you and Ms. Shaw in the same precinct in Durham?

A. Yes, we are.

Q. Could you state whether that's a split district?

A. Yes, it is.

Q. Could you state whether you have become aware of any confusion on the part of voters in your precinct as to which of them are in the 24th District and which are in the 2nd District?

A. I certainly have.

• • • •

[1086] Q. Can you state how you became aware of confusion on the part of other voters in your precinct?

A. Well, one instance that's particularly clear in my mind occurred early this spring when I received the only communication, the only communication that I ever received from Congressman Watt's office, which was this brochure listing the availability of constituent services offered by his staff. My next door neighbor, who is a life-long resident of Durham, who is a history teacher in the county [1087] schools and who is recognized nationally in a variety of ways with awards she received.

Mr. Speas: Objection.

Judge Phillips: You don't need to develop this person.

A. In a subsequent conversation with us, said I've heard from Representative Watt. And we said we've heard, too, and she said why in the world would Representative Watt communicate with me. We said well, you're in his district, didn't you know that. She said no,

I didn't know that. Didn't you vote in the last election? Yes.

She pulled down the Democratic lever with no awareness at all she was voting for Representative Watt.

Also, during the course of this trial, I had been under the impression that the division line in our precinct ran down Academy Road. I had been led to believe this because colleagues of mine who lived on the other side of Academy Road told me they were still in Representative Valentine's district.

I had occasion to look through the book of exhibits that was prepared by Dr. Hofeller and I was curious to see the exact definition of our district. I looked at the precinct. I noticed that the area across Academy Road was in Representative Watt's district.

Here again, there obviously was confusion on the part [1088] of these colleagues of mine who are not illiterate people, who thought they were in Representative Valentine's district although they, in fact, appeared to be in Representative Watt's district.

Q. Now, did you receive any postcard from the Durham County board of elections to show that you were in — the congressional district that you were?

A. I may have very well received it. I don't have any independent recollection of it but I would say to you that I was fully aware of the fact that I was in Representative Watt's district because I followed the matter rather closely and the fact of the matter is that I probably treated any sort of postcard of that sort as being a postcard that's giving me superfluous information. I probably treated it with the respect that I treated with any general mailing that's not addressed to me personally.

Q. You heard Mr. Watt testify about his ability to represent the voters in the 12th district. As one of those

voters, can you state to what extent you believe he's able to represent you?

Mr. Stein: Objection.

Judge Phillips: Overruled.

A. Well, if you ask me if he's able to represent me, and you're inquiring as to his competence, I would have to say he appears to me to be an intelligent man, he appears to [1089] have had experience in politics and in elective office although he was appointed to the office.

He's a graduate of a good law school; some think it's almost as good as Duke. He certainly is a successful lawyer. So, in terms of his competence, I don't have any question about his ability to represent me.

My objection isn't to him personally. I have no objection to Representative Watt as a person. My objection, rather, goes to the circumstances under which he was elected to the position that he now holds which really goes to the matter in which the district is formed The representation is made —

Mr. Stein: Objection, your honor. This clearly is not —

Judge Phillips: It's unresponsive to the question asked. As far as I can tell, the question is does he have an opinion as to whether he can fairly represent him.

Q. That's right, as to whether he can fairly represent you.

A. May I proceed?

Q. Just direct yourself to that question.

A. All right. Representative Watt was elected as the representative from the district that was deliberately designed to produce a black representative, deliberately [1090] designed to produce a black representative. As such, by his own admission, he perceives his role to be, and I think he is perceived by others, certainly myself,

to be one who regards the black mix of his district as his paramount constituency. He made that particular statement in at least so many words today.

Mr. Stein: Objection.

Judge Phillips: Overruled. Let him go on.

A. To the extent that he sees this constituency the paramount constituents which he must respond, it seems he relegates non-black members of his district to a second class status. Seems to me that this effectively, to that extent, disenfranchises me, and to that extent I do believe that he is unable to represent me as I think my representative should.

I think the problem is compounded by the dysfunctional shape of the district. Charlotte is the demographic center of gravity of the district.

Mr. Speas: Objection. Non-responsive to the question.

Judge Phillips: I take it he's going to say irregular shape also contributes to the inability of Congressman Watt to failing to represent him as a white member living at the other end of the district.

A. Quite so.

[1091] Q. What were you going to say in that regard?

A. I said Representative Watt, representative who is a resident of Charlotte, who is elected largely only by the support from the electorate in Charlotte, is a representative who cannot fairly and does not fairly represent the interests of Durham.

Durham is the high end of a very peculiarly shaped animal in many respects. The fact of the matter is that in Durham he is a very, very faint presence. I think that the local media, not through any animus but only to the fact that he has such low visibility. The local media ignored him, not completely, but comparatively ignored

him and evidence of this is the fact that when the newspapers, for example, carry a story or an editorial and urge their readers to communicate with members of congress, they say if you are from Orange County or Wake County, communicate with Representative Price or Representative Valentine.

Mr. Stein: Objection, move to strike. Hearsay.

Judge Phillips: Sustained. That portion of the answer is stricken.

A. I would say, also, that to the best of my knowledge he's never introduced any sort of legislation that particularly benefits Durham or that particular area.

I would note also that when the Raleigh-Durham Airport was the site of a celebration marking the [1092] inauguration of flights from Raleigh-Durham to England, a matter that received a great deal of local attention and certainly enhanced the pride and the sense that the community would benefit, Representative Price was there, Representative Valentine was there, Representative Watt was nowhere in evidence.

Now, he may have had other important things to do but I have the feeling if this were the Charlotte Airport he would have been there.

In sum, what I'm saying is that owing to the circumstances of which he was elected, the fact that in a sense he has an official mandate, by virtue of the way in which the district was drawn, to represent his black constituency, by virtue of the geographic which encourages him to ignore the interests of people in Durham and perhaps other areas of the district as well. By virtue of this, we are effectively denied representation and this, I regard, a denial of equal proceedings and unfair.

* * * *

1991 CONGRESSIONAL BASE PLAN #6
Chapter 601 of the 1991 Session Laws

August 31, 1995



LEGEND

- County Boundary
- District 1
- District 2
- District 3
- District 4
- District 5
- District 6
- District 7
- District 8
- District 9
- District 10
- District 11
- District 12

N.C. General Assembly
Legislative Services Ofc.
Redistricting System
Software Copyright 1990
Public Systems Associates

Stipulation Exhibit 10

District Summary
TOTAL POPULATIONS, ALL AGES
Plan: 1991 Congressional Base Plan #6

District Name	Total Pop.	Total White	Total Black	Total Am. Ind.	Total Asian/PI	Total Other
District 1	552,386	238,558	307,639	3,440	1,421	1,326
	100.00%	43.19%	55.69%	0.62%	0.26%	0.24%
District 2	552,386	422,316	121,012	1,864	4,236	2,961
	100.00%	76.45%	21.91%	0.34%	0.77%	0.54%
District 3	552,387	406,320	135,102	2,873	3,943	4,149
	100.00%	73.56%	24.46%	0.52%	0.71%	0.75%
District 4	552,387	429,010	108,531	1,544	10,607	2,701
	100.00%	77.66%	19.65%	0.28%	1.92%	0.49%
District 5	552,386	443,553	103,627	1,042	2,544	1,620
	100.00%	80.30%	18.76%	0.19%	0.46%	0.29%
District 6	552,387	405,035	139,218	2,262	4,295	1,576
	100.00%	73.32%	25.20%	0.41%	0.78%	0.29%
District 7	552,387	362,775	134,344	45,602	4,351	5,315
	100.00%	65.67%	24.32%	8.26%	0.79%	0.96%
District 8	552,386	398,020	133,287	9,149	5,683	6,247
	100.00%	72.05%	24.13%	1.66%	1.03%	1.13%
District 9	552,386	401,638	138,010	2,039	8,582	2,118
	100.00%	72.71%	24.98%	0.37%	1.55%	0.38%
District 10	552,386	487,638	59,734	1,021	3,071	922
	100.00%	88.28%	10.81%	0.18%	0.56%	0.17%
District 11	552,387	511,432	30,250	7,888	1,854	963
	100.00%	92.59%	5.48%	1.43%	0.34%	0.17%
District 12	552,386	502,197	45,575	1,432	1,579	1,603
	100.00%	90.91%	8.25%	0.26%	0.29%	0.29%
Total	6,628,637	5,008,492	1,456,329	80,156	52,166	31,501
	100.00%	75.56%	21.97%	1.21%	0.79%	0.48%

Stipulation Exhibit 10 (cont'd)

District Summary
VOTING AGE POPULATIONS
Plan: 1991 Congressional Base Plan #6

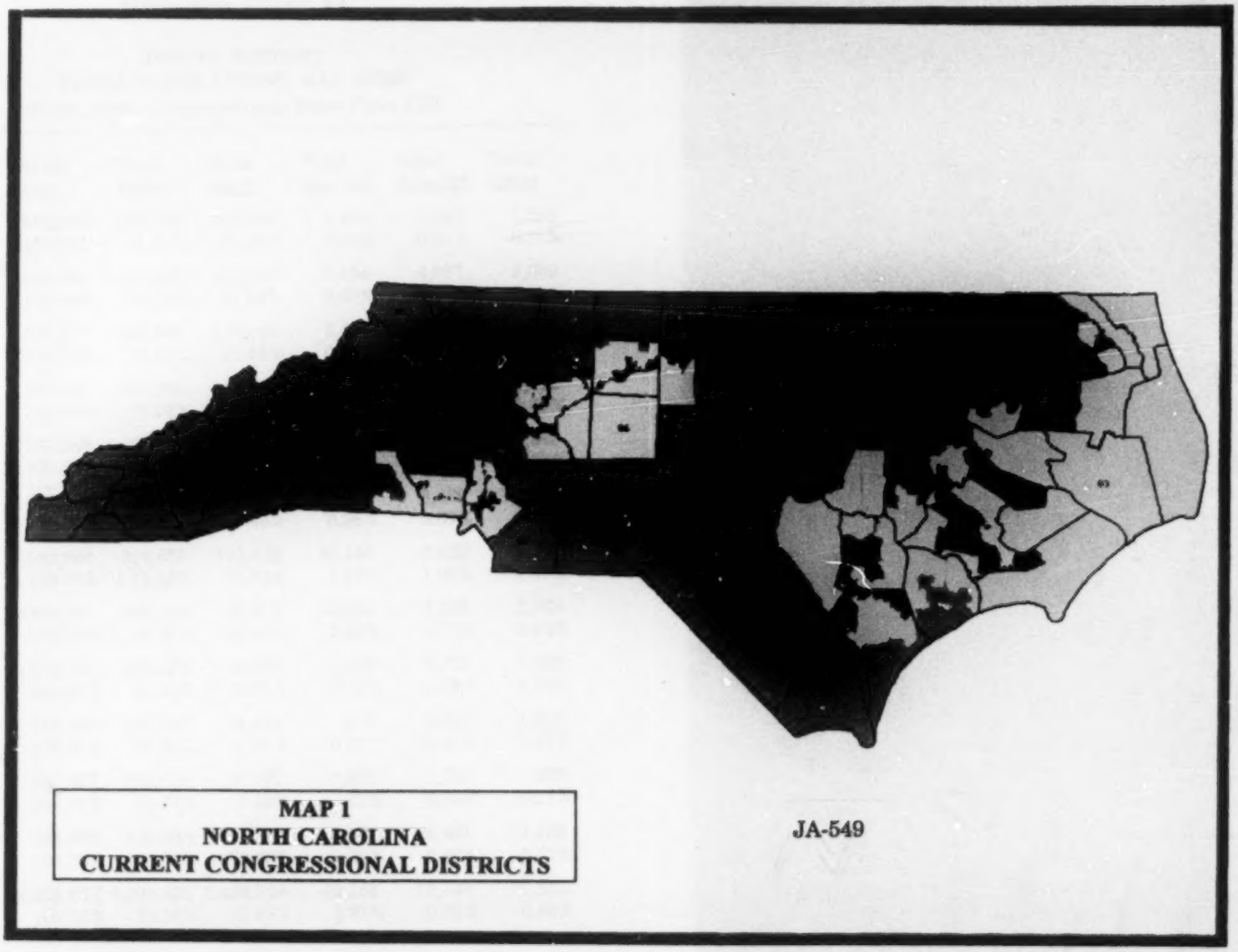
District Name	Total Vot. Age	Vot. Age White	Vot. Age Black	Vot. Age Am. Ind.	Vot. Age Asian/PI	Vot. Age Other
District 1	403,730	188,675	210,657	2,451	1,048	911
	100.00%	46.73%	52.18%	0.61%	0.26%	0.23%
District 2	417,372	327,799	83,153	1,289	3,164	2,013
	100.00%	78.54%	19.92%	0.31%	0.76%	0.48%
District 3	412,249	312,402	92,168	2,038	2,848	2,793
	100.00%	75.78%	22.36%	0.49%	0.69%	0.68%
District 4	428,556	338,601	79,032	1,235	7,789	1,899
	100.00%	79.01%	18.44%	0.29%	1.82%	0.44%
District 5	427,308	350,285	73,404	773	1,797	1,049
	100.00%	81.97%	17.18%	0.18%	0.42%	0.25%
District 6	427,800	321,164	100,954	1,697	2,943	1,044
	100.00%	75.07%	23.60%	0.40%	0.69%	0.24%
District 7	412,308	283,667	91,753	29,794	3,142	3,952
	100.00%	68.80%	22.25%	7.23%	0.76%	0.96%
District 8	404,877	302,323	88,423	5,963	4,016	4,152
	100.00%	74.67%	21.84%	1.47%	0.99%	1.03%
District 9	418,549	314,959	94,789	1,472	5,860	1,472
	100.00%	75.25%	22.65%	0.35%	1.40%	0.35%
District 10	418,574	374,915	40,392	759	1,871	637
	100.00%	89.57%	9.65%	0.18%	0.45%	0.15%
District 11	430,245	402,078	21,143	5,160	1,261	603
	100.00%	93.45%	4.91%	1.20%	0.29%	0.14%
District 12	420,919	385,695	32,008	1,037	1,085	1,094
	100.00%	91.63%	7.60%	0.25%	0.26%	0.26%
Total	5,022,487	3,902,563	1,007,876	53,668	36,824	21,619
	100.00%	77.70%	20.07%	1.07%	0.73%	0.43%

Stipulation Exhibit 10 (cont'd)

District Summary
REGISTRATION
Plan: 1991 Congressional Base Plan #6

District Name	Total Reg.	White Reg.	Black Reg.	Other Reg.	Dem. Reg.	Repub. Reg.
District 1	276,192	132,170	141,809	2,214	239,773	29,442
	100.00%	47.85%	51.34%	0.80%	86.81%	10.66%
District 2	270,125	223,873	44,324	1,932	191,823	65,441
	100.00%	82.88%	16.41%	0.72%	71.01%	24.23%
District 3	249,138	194,731	53,392	1,012	176,308	62,454
	100.00%	78.16%	21.43%	0.41%	70.77%	25.07%
District 4	301,423	249,047	50,738	1,636	187,834	88,310
	100.00%	82.62%	16.83%	0.54%	62.32%	29.30%
District 5	294,809	247,710	46,589	541	176,112	99,839
	100.00%	84.02%	15.80%	0.18%	59.74%	33.87%
District 6	304,099	232,639	70,549	882	191,705	93,888
	100.00%	76.50%	23.20%	0.29%	63.04%	30.87%
District 7	240,408	165,152	55,300	19,961	176,690	55,123
	100.00%	68.70%	23.00%	8.30%	73.50%	22.93%
District 8	234,182	183,139	48,726	2,311	152,925	68,294
	100.00%	78.20%	20.81%	0.99%	65.30%	29.16%
District 9	303,031	238,242	63,474	1,315	167,892	112,424
	100.00%	78.62%	20.95%	0.43%	55.40%	37.10%
District 10	268,939	243,024	25,575	344	144,322	107,779
	100.00%	90.36%	9.51%	0.13%	53.66%	40.08%
District 11	320,051	304,146	13,559	2,342	188,649	112,071
	100.00%	95.03%	4.24%	0.73%	58.94%	35.02%
District 12	281,460	261,816	19,280	365	128,727	137,752
	100.00%	93.02%	6.85%	0.13%	45.74%	48.94%
Total	3,343,857	2,675,689	633,315	34,855	2,122,760	1,032,817
	100.00%	80.02%	18.94%	1.04%	63.48%	30.89%

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MAP 1
NORTH CAROLINA
CURRENT CONGRESSIONAL DISTRICTS

Stipulation Exhibit 10

District Summary
TOTAL POPULATIONS, ALL AGES
Plan: 1992 Congressional Base Plan #10

District Name	Total Pop.	Total White	Total Black	Total Am. Ind.	Total Asian/PI	Total Other
District 1	552,386	229,829	316,290	3,424	1,146	1,698
	100.00%	41.61%	57.26%	0.62%	0.21%	0.31%
District 2	552,386	421,083	121,212	3,154	4,077	2,860
	100.00%	76.23%	21.94%	0.57%	0.74%	0.52%
District 3	552,387	423,398	118,640	2,436	4,044	3,869
	100.00%	76.65%	21.48%	0.44%	0.73%	0.70%
District 4	552,387	426,361	111,168	1,548	10,602	2,714
	100.00%	77.19%	20.13%	0.28%	1.92%	0.49%
District 5	552.386	463,183	83,824	1,083	2,448	1,848
	100.00%	83.85%	15.17%	0.20%	0.44%	0.33%
District 6	552,386	504,465	41,329	1,973	3,489	1,129
	100.00%	91.32%	7.48%	0.36%	0.63%	0.20%
District 7	552,386	394,855	103,428	40,166	5,835	8,102
	100.00%	71.48%	18.72%	7.27%	1.06%	1.47%
District 8	552,387	402,406	128,417	13,789	4,232	3,543
	100.00%	72.85%	23.25%	2.50%	0.77%	0.64%
District 9	552,387	492,424	49,308	1,729	7,373	1,553
	100.00%	89.14%	8.93%	0.31%	1.33%	0.28%
District 10	552,386	517,542	30,155	942	2,238	1,510
	100.00%	93.69%	5.46%	0.17%	0.41%	0.27%
District 11	552,387	502,058	39,767	7,835	1,791	936
	100.00%	90.89%	7.20%	1.42%	0.32%	0.17%
District 12	552,386	230,888	312,791	2,077	4,891	1,739
	100.00%	41.80%	56.63%	0.38%	0.89%	0.31%
Total	6,628,637	5,008,492	1,456,329	80,156	52,166	31,501
	100.00%	75.56%	21.97%	1.21%	0.79%	0.48%

Stipulation Exhibit 10 (cont'd)

District Summary
VOTING AGE POPULATIONS, ALL AGES
Plan: 1992 Congressional Base Plan #10

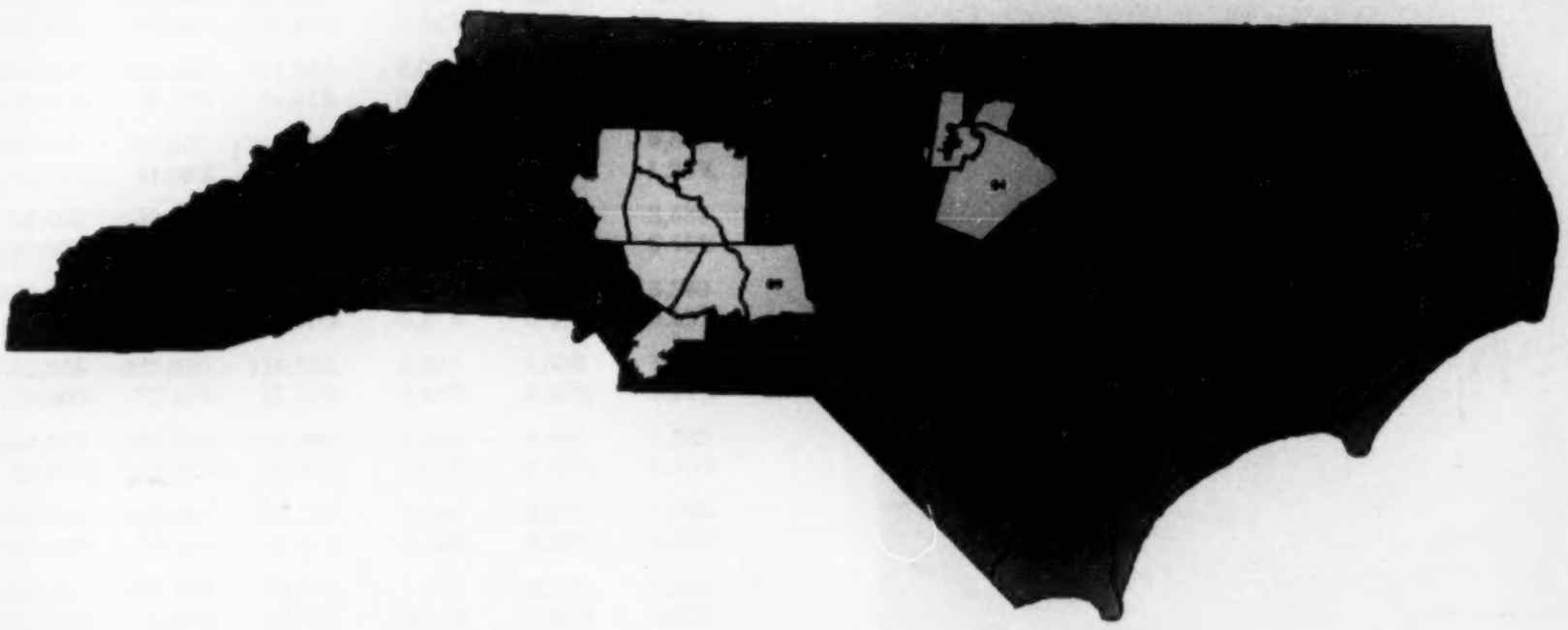
District Name	Total Vot. Age	Vot. Age White	Vot. Age Black	Vot. Age Am. Ind.	Vot. Age Asian/PI	Vot. Age Other
District 1	399,969	181,933	213,602	2,428	844	1,110
	100.00%	45.49%	53.40%	0.61%	0.21%	0.28%
District 2	420,087	328,676	84,311	2,173	3,074	1,963
	100.00%	78.24%	20.07%	0.52%	0.73%	0.47%
District 3	413,263	324,808	81,170	1,755	2,922	2,608
	100.00%	78.60%	19.64%	0.42%	0.71%	0.63%
District 4	428,984	336,850	81,210	1,239	7,782	1,903
	100.00%	78.52%	18.93%	0.29%	1.81%	0.44%
District 5	428,782	364,886	60,204	822	1,650	1,221
	100.00%	85.10%	14.04%	0.19%	0.38%	0.28%
District 6	428,096	393,271	30,188	1,433	2,407	798
	100.00%	91.87%	7.05%	0.33%	0.56%	0.19%
District 7	414,413	306,754	71,071	26,489	4,201	5,898
	100.00%	74.02%	17.15%	6.39%	1.01%	1.42%
District 8	403,678	305,366	84,386	8,699	2,956	2,271
	100.00%	75.65%	20.90%	2.15%	0.73%	0.56%
District 9	421,615	380,364	33,849	1,275	5,059	1,069
	100.00%	90.22%	8.03%	0.30%	1.20%	0.25%
District 10	421,456	397,476	20,837	700	1,409	1,036
	100.00%	94.31%	4.94%	0.17%	0.33%	0.25%
District 11	430,457	396,064	27,438	5,126	1,237	592
	100.00%	92.01%	6.37%	1.19%	0.29%	0.14%
District 12	411,687	186,115	219,610	1,529	3,283	1,150
	100.00%	45.21%	53.34%	0.37%	0.80%	0.28%
Total	5,022,487	3,902,563	1,007,876	53,668	36,824	21,619
	100.00%	77.70%	20.07%	1.07%	0.73%	0.43%

Stipulation Exhibit 10 (cont'd)

District Summary
REGISTRATION
Plan: 1992 Congressional Base Plan #10

District Name	Total Reg.	White Reg.	Black Reg.	Other Reg.	Dem. Reg.	Repub. Reg.
District 1	270,229	132,323	136,536	1,296	235,445	29,509
	110.00%	48.97%	50.53%	0.48%	87.13%	10.92%
District 2	270,061	219,727	48,153	2,196	190,564	66,366
	100.00%	81.36%	17.83%	0.81%	70.56%	24.57%
District 3	248,318	201,699	45,684	955	173,132	64,771
	100.00%	81.23%	18.40%	0.38%	69.72%	26.08%
District 4	306,226	250,780	53,212	2,238	191,876	88,762
	100.00%	81.89%	17.38%	0.73%	62.66%	28.99%
District 5	293,437	255,458	37,427	550	178,786	97,316
	100.00%	87.06%	12.75%	0.19%	60.93%	33.16%
District 6	292,842	273,216	18,907	726	145,337	128,153
	100.00%	93.30%	6.46%	0.25%	49.63%	43.76%
District 7	218,613	162,148	38,413	18,104	154,517	55,296
	100.00%	74.17%	17.57%	8.28%	70.68%	25.29%
District 8	254,082	197,961	52,140	3,973	166,645	74,262
	100.00%	77.91%	20.52%	1.56%	65.59%	29.23%
District 9	296,124	270,843	24,125	1,154	148,223	124,786
	100.00%	91.46%	8.15%	0.39%	50.05%	42.14%
District 10	297,917	283,928	13,611	398	135,660	142,775
	100.00%	95.30%	4.57%	0.13%	45.54%	47.92%
District 11	318,958	299,765	16,847	2,338	192,259	107,923
	100.00%	93.98%	5.28%	0.73%	60.28%	33.84%
District 12	283,076	129,930	151,555	1,568	216,967	51,900
	100.00%	45.90%	53.54%	0.55%	76.65%	18.33%
Total	3,349,883	2,677,778	636,610	35,496	2,129,411	1,031,819
	100.00%	79.94%	19.00%	1.06%	63.57%	30.80%

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MAP 2
NORTH CAROLINA
SHAW II
SAMPLE PLAN FOR COMPARISON

Plaintiff-Intervenors' Exhibit 301

District Summary
TOTAL POPULATIONS, ALL AGES
Plan: SHAW PLAN 2

Plan type: Congressional Base Plan

District Name	Total Pop.	Total White	Total Black	Total Am. Ind.	Total Asian/PI	Total Other
District 1	552,386	243,481	302,681	3,542	1,276	1,407
	100.00%	44.08%	54.80%	0.64%	0.23%	0.25%
District 2	552,387	418,386	121,043	2,001	5,179	5,778
	100.00%	75.74%	21.91%	0.36%	0.94%	1.05%
District 3	552,387	248,297	246,325	44,065	7,055	6,645
	100.00%	44.95%	44.59%	7.98%	1.28%	1.20%
District 4	552,386	430,608	106,257	1,445	11,594	2,488
	100.00%	77.95%	19.24%	0.26%	2.10%	0.45%
District 5	552,386	427,277	115,997	2,042	3,730	3,340
	100.00%	77.35%	21.00%	0.37%	0.68%	0.60%
District 6	552,386	427,910	116,258	2,361	4,525	1,331
	100.00%	77.47%	21.05%	0.43%	0.82%	0.24%
District 7	552,387	399,948	134,949	11,462	2,689	3,339
	100.00%	72.40%	24.43%	2.07%	0.49%	0.60%
District 8	552,386	439,504	107,751	1,068	2,083	1,980
	100.00%	79.56%	19.51%	0.19%	0.38%	0.36%
District 9	552,387	473,418	73,812	1,611	2,177	1,369
	100.00%	85.70%	13.36%	0.29%	0.39%	0.25%
District 10	552,386	485,484	56,038	1,799	7,409	1,657
	100.00%	87.89%	10.14%	0.33%	1.34%	0.30%
District 11	552,386	495,705	52,075	877	2,533	1,196
	100.00%	89.74%	9.43%	0.16%	0.46%	0.22%
District 12	552,387	518,474	23,143	7,883	1,916	971
	100.00%	93.86%	4.19%	1.43%	0.35%	0.18%
Total	6,628,637	5,008,492	1,456,329	80,156	52,166	31,501
	100.00%	75.56%	21.97%	1.21%	0.79%	0.48%

Plaintiff-Intervenors' Exhibit 301 (cont'd)

District Summary
VOTING AGE POPULATIONS
Plan: SHAW PLAN 2

Plan type: Congressional Base Plan

District Name	Total Vot. Age	Vot. Age White	Vot. Age Black	Vot. Age Am. Ind.	Vot. Age Asian/PI	Vot. Age Other
District 1	404,419	192,884	207,184	2,506	918	986
	100.00%	47.69%	51.23%	0.62%	0.23%	0.24%
District 2	417,022	323,471	84,011	1,543	3,703	4,294
	100.00%	77.57%	20.15%	0.37%	0.89%	1.03%
District 3	394,582	191,192	165,494	28,520	4,952	4,424
	100.00%	48.45%	41.94%	7.23%	1.25%	1.12%
District 4	427,417	338,543	77,488	1,137	8,506	1,743
	100.00%	79.21%	18.13%	0.27%	1.99%	0.41%
District 5	421,776	334,525	80,719	1,462	2,800	2,269
	100.00%	79.31%	19.14%	0.35%	0.66%	0.54%
District 6	427,531	337,785	83,989	1,744	3,106	908
	100.00%	79.01%	19.65%	0.41%	0.73%	0.21%
District 7	411,003	308,205	90,909	7,681	1,985	2,223
	100.00%	74.99%	22.12%	1.87%	0.48%	0.54%
District 8	424,770	344,221	76,976	815	1,503	1,256
	100.00%	81.04%	18.12%	0.19%	0.35%	0.30%
District 9	418,253	364,098	50,730	1,135	1,412	878
	100.00%	87.05%	12.13%	0.27%	0.34%	0.21%
District 10	421,784	375,916	38,306	1,307	5,095	1,162
	100.00%	89.13%	9.08%	0.31%	1.21%	0.28%
District 11	420,411	381,870	35,549	653	1,504	836
	100.00%	90.83%	8.46%	0.16%	0.36%	0.20%
District 12	433,519	409,853	16,521	5,165	1,340	640
	100.00%	94.54%	3.81%	1.19%	0.31%	0.15%
Total	5,022,487	3,902,563	1,007,876	53,668	36,824	21,619
	100.00%	77.70%	20.07%	1.07%	0.73%	0.43%

Plaintiff-Intervenors' Exhibit 301 (cont'd)

District Summary
REGISTRATION
Plan: SHAW PLAN 2

Plan type: Congressional Base Plan

District Name	Total Reg.	White Reg.	Black Reg.	Other Reg.	Dem. Reg.	Repub. Reg.
District 1	276,045	137,522	136,389	2,146	241,232	28,709
	100.00%	49.82%	49.41%	0.78%	87.39%	10.40%
District 2	224,202	181,595	41,947	658	158,505	54,663
	100.00%	81.00%	18.71%	0.29%	70.70%	24.38%
District 3	226,869	108,125	100,132	18,636	182,231	35,350
	100.00%	47.66%	44.14%	8.21%	80.32%	15.58%
District 4	304,152	250,580	50,260	3,298	186,382	90,233
	100.00%	82.39%	16.52%	1.08%	61.28%	29.67%
District 5	268,207	221,818	45,408	988	183,396	72,005
	100.00%	82.70%	16.93%	0.37%	68.38%	26.85%
District 6	302,567	240,373	61,337	849	173,564	109,104
	100.00%	79.44%	20.27%	0.28%	57.36%	36.06%
District 7	271,479	207,411	59,992	4,073	192,987	69,514
	100.00%	76.40%	22.10%	1.50%	71.09%	25.61%
District 8	287,175	237,846	48,770	559	174,343	96,669
	100.00%	82.82%	16.98%	0.19%	60.71%	33.66%
District 9	275,049	241,600	33,042	409	151,951	108,508
	100.00%	87.84%	12.01%	0.15%	55.25%	39.45%
District 10	297,525	269,814	26,514	1,184	147,642	126,449
	100.00%	90.69%	8.91%	0.40%	49.62%	42.50%
District 11	286,373	263,976	22,042	343	156,313	112,777
	100.00%	92.18%	7.70%	0.12%	54.58%	39.38%
District 12	330,240	317,118	10,777	2,353	180,865	127,838
	100.00%	96.03%	3.26%	0.71%	54.77%	38.71%
Total	3,349,883	2,677,778	636,610	35,496	2,129,411	1,031,819
	100.00%	79.94%	19.00%	1.06%	63.57%	30.80%

Plaintiff-Intervenors' Exhibit 301 (cont'd)

District Summary
ELECTIONS
Plan: SHAW PLAN 2

Plan type: Congressional Base Plan

District Name	Senate Gantt	Senate Helms	Lt. Gov Rand	Lt.Gov Gardner	Court Lewis	Court Smith
District 1	96,148	66,794	104,617	53,920	108,448	39,296
	59.01%	40.99%	65.99%	34.01%	73.40%	26.60%
District 2	58,305	75,781	67,631	72,190	71,277	58,252
	43.48%	56.52%	48.37%	51.63%	55.03%	44.97%
District 3	86,257	40,198	80,666	35,081	72,994	29,739
	68.21%	31.79%	69.69%	30.31%	71.05%	28.95%
District 4	107,267	85,514	94,449	94,923	80,241	88,558
	55.64%	44.36%	49.87%	50.13%	47.54%	52.46%
District 5	73,837	95,157	81,555	86,923	81,330	73,948
	43.69%	56.31%	48.41%	51.59%	52.38%	47.62%
District 6	79,691	94,372	82,396	89,278	72,357	86,343
	45.78%	54.22%	48.00%	52.00%	45.59%	54.41%
District 7	71.557	87,040	89,740	74,910	84,999	67,166
	45.12%	54.88%	54.50%	45.50%	55.86%	44.14%
District 8	73,469	100,151	89,686	95,498	82,377	86,078
	42.32%	57.68%	48.43%	51.57%	48.90%	51.10%
District 9	63,828	106,377	77,292	102,063	72,339	98,547
	37.50%	62.50%	43.09%	56.91%	42.33%	57.67%
District 10	82,446	97,632	71,995	106,063	57,372	100,006
	45.78%	54.22%	40.43%	59.57%	36.45%	63.55%
District 11	69,416	106,760	80,638	104,489	78,796	99,462
	39.40%	60.60%	43.56%	56.44%	44.20%	55.80%
District 12	88,720	104,587	94,490	110,319	90,551	101,056
	45.90%	54.10%	46.14%	53.86%	47.26%	52.74%
Total	950,941	1,060,363	1,015,155	1,025,657	953,081	928,451
	47.28%	52.72%	49.74%	50.26%	50.65%	49.35%

Defendant's Exhibit 403

A HISTORICAL PERSPECTIVE ON NORTH CAROLINA'S PIEDMONT CRESCENT AND "DOWN EAST" CONGRESSIONAL DISTRICTS

By David R. Goldfield

I have been retained by the State of North Carolina because of my expertise in Southern urbanization and race relations. I teach Southern history, urban history, and the civil rights era at the University of North Carolina at Charlotte where I have been the Robert Lee Bailey Professor of History since 1982. I have written or edited ten books on various aspects of Southern history, urbanization and race relations. Two of my books have received the Mayflower Award for Non-Fiction (in 1983 and 1991) and one book was nominated for the Pulitzer Prize in history. In addition, I have written numerous articles for scholarly refereed journals, as well as for the popular press. I serve as Editor-in-Chief of the *Journal of Urban History*, the leading international journal in urban history, and on the Executive Council of the Southern Historical Association. For the past six years, I have worked periodically for the United States Information Agency making presentations on race relations and urbanization to business and educational groups in Asia and Europe. Finally, I serve as consultant to numerous historical museums in the South, including the Museum of the Confederacy, the Valentine Museum, the Memphis City Museum, and the Museum of the New South. I am currently writing a history of the South for D.C. Heath Publishing Company.

My role in this case is to answer three questions. First, does the particular part of the Piedmont Crescent encompassed by the Twelfth Congressional District have historical integrity? Second, how has the Piedmont Crescent differed historically from other parts of the state? And third, how have the lives of blacks in [sic]

whites differed in urban and rural North Carolina over the past century, with particular reference to the Twelfth and First Congressional Districts.

The 12th Congressional District traces the spine of the North Carolina Piedmont Crescent. A swath of territory bending from Raleigh to Charlotte, the Crescent is part of the larger Piedmont region of North Carolina. Lacking the majesty of the mountains to the west or the anticipation of the coastal plain as it slopes toward the splendid beaches to the east the Piedmont has not figured significantly in regional romance. Thomas Wolfe wrote often about this region, and seldom in flattering terms. In *Look Homeward, Angel*, Oliver Gant stares out from his train window and sees "the fallow unworked earth, the great raw lift of the Piedmont, the muddy red clay roads, and the slattern people." From this unpromising landscape, however, rose the urban, economic, and cultural heart and soul of the state of North Carolina, the Piedmont Crescent, a region of hope for its citizens, and a place of opportunity for newcomers from all over the world.

Few would have presumed such a destiny for the Piedmont or for North Carolina one hundred and fifty years ago. Known as the "Rip Van Winkle State," North Carolina boasted few towns and large plantations, and those were concentrated in the eastern part of the state. Geography cut off residents west of the fall line from the coast. Seldom trading with each other, often at odds over political issues, and ethnically and racially different — the Piedmont was home to a large Scotch-Irish and German population, and relatively few slaves and free blacks — the eastern and western parts of the state diverged as much as two parts of the same political entity could.

The sectional estrangement contributed to the state's weak, subsistence economy before the Civil War. Coast and Piedmont were isolated from each other and the divided state had few connections to the developing

national economy beyond its borders. But in the 1840s, leaders from both sections proposed a common solution to North Carolina's chronic economic problems. A railroad spanning the length of the Piedmont Crescent would tie the sections together and bring prosperity to both. The state legislature chartered the North Carolina Railroad in 1849 and financed three-quarters of the total construction cost. Completed in 1856 and running from Goldsboro to Raleigh, and then to Salisbury and Charlotte, the North Carolina Railroad was hailed by legislators as an "Iron Messiah," destined to deliver the state from economic dependence.

Deliverance came, but in ways unexpected by the railroad's promoters. Leaders in eastern North Carolina hoped that the railroad could revive the district's somnolent ports as commerce from the Piedmont and points west poured into the area. Piedmonters, however, viewed the railroad as a means to connect with other roads in Virginia and South Carolina to tap the markets of the Deep South and the urban Northeast. Of these two visions — the east-west hope of eastern North Carolina, and the north-south network sought by Piedmont residents — the latter prevailed when military necessity during the Civil War resulted in a link between the North Carolina Railroad and the Richmond and Danville line to the north. After the war, the regularization of gauges throughout the country and the eventual consolidation of the North Carolina Railroad into J. P. Morgan's Southern Railway empire in 1894, secured the Piedmont's wishes for a north-south route and dashed eastern residents' hopes for an economic revival. Ironically, the project that promoters designed to bring the state together resulted in widening the differences between the Piedmont and the coastal plain.

The North Carolina Railroad helped to define a subregion of the Piedmont, the Piedmont Crescent, but it did not precipitate an economic revolution along its tracks

after the Civil War. Small towns dotted the route, but significant urbanization did not occur. As the state's railroad became integrated into a national system, the Piedmont Crescent served as a way-station between the Deep South and the Northeast funneling raw materials northward and providing easier access for Northern manufactured products into Southern markets. But if the railroad reinforced North Carolina's role as an economic colony, its presence in the Piedmont also served as a catalyst for industrial activity.

First, the railroad brought people to the small towns that grew up around the tracks. Like Washington Duke who moved to Durham in 1874 to build a steam-powered factory near the railroad to move his tobacco around the country, or his enterprising son, James B., who brought Russian Jewish immigrants down from New York to teach his employees the art of hand-rolling a cigarette, and who took the railroad to visit Richmond in 1884 where he first saw a not-too-reliable machine that did the rolling one hundred times faster when it worked at all, and who built a tobacco empire, the American Tobacco Company, once he perfected the balky machine.

Or D. A. Tompkins of Edgefield, South Carolina, who came to Charlotte in the 1870s with an engineering degree from a school in New York, and who stood at the railroad depot and watched carload after carload of raw cotton bound for the North and wondered why the South and North Carolina in particular grew all that cotton and yet processed so little of it. And he wondered how the sallow-complected sons and daughters of sharecroppers and tenants of whom there were too many for the bleeding Piedmont soil to support, could survive in a region blasted by war and suffocated by poverty. So he launched a cotton mill campaign up and down the Piedmont Crescent in the 1880s. Tompkins' efforts bore fruit. By 1900 more than one-half of the looms in the South were located within a 100-mile radius of Charlotte.

Or George Black, whose grandmother and father were slaves and who walked to Winston in 1889 from a five-acre farm in Randolph County because he and his father had heard there were opportunities there, even for blacks. He lived in a one-room tenement with eleven other people and worked at hauling bricks. Within a few years, Black built his own brickyard and soon white contractors were buying his high-quality work. His bricks today form the sidewalk at Old Salem, as well as the site's market firehouse.

The Piedmont Crescent towns, modest though they were (Charlotte had little more than 2,000 residents in 1880), provided opportunities for enterprising young men and women of both races. They offered a market for products and work for those who needed it. By the early 1900s, the Piedmont Crescent towns along the Southern Railway (formerly the North Carolina Railroad) were workshops in creation. Lunsford Richardson, a Davidson College graduate, settled in Greensboro just after the turn of the century and founded the Vick Chemical Company where he developed Vick's Vaporub in 1912. In Durham at the same time, a young druggist, Germain Bernard, dispensed headache powders for customers who staggered into his pharmacy with hangovers. The results were so successful that he began marketing his concoction as BC Headache Powder. A rival druggist, Tom Stanback in Salisbury, marketed his own headache mix which he promoted with the phrase, "Snap Back with Stanback."

In High Point, a group of woodworkers expanded their shops, taking advantage of good railroad connections and proximity to hardwoods to develop a thriving furniture industry that boasted twenty-six manufacturers by 1902. The industry spread to smaller communities such as Thomasville and Lexington.

The capital generated from textile, tobacco, and furniture spawned other activities that expanded the Pied-

mont Crescent economy and encouraged the growth of the region's towns. Money from Dick Reynolds' tobacco company in Winston supported the establishment of Wachovia Bank and Trust Company. Financing the textile mills and machinery firms in and around Charlotte enabled a few merchants and developers to pool their resources and establish several banks by 1900, the forerunner of that city's financial empire. The savings of Durham's blacks created the "Negro Wall Street of America" in downtown Durham early in the century, capped off in 1921 by the six-story building of the North Carolina Mutual Life Insurance Company, the largest black-owned business in the South. These financial institutions contributed to the continued prosperity of the Piedmont Crescent. Dependence on Northern banks had foisted high interest rates and unattractive repayment provisions on firms seeking to expand or refinance their operations.

Profits from Piedmont Crescent enterprises found other outlets as well. James B. Duke funneled capital from his successful American Tobacco Company to a new endeavor, the Southern Power Company. Supplying business and industry with cheap and reliable electricity freed entrepreneurs from dependence on steam or water power. The Duke family also endowed Trinity College in Durham which became Duke University. Dick Reynolds established a foundation for the arts and education that propelled North Carolina into the forefront of philanthropic support for research and creativity. By the 1920s, struggling colleges such as Wake Forest, the state universities at Chapel Hill and Raleigh, and the woman's college at Greensboro received better funding and better-trained faculty. Earlier, the movement of blacks to Piedmont Crescent towns resulted in the founding of several church-related institutions of higher education such as Shaw University in Raleigh, the Biddle Institute (later Johnson C. Smith University) in Charlotte, and in 1910, North Carolina College (now North Carolina Central) in Durham, the first state-supported liberal arts college for blacks in the United States.

By 1920 a major regional shift had occurred in North Carolina. Before the Civil War, the economic and demographic center of the state lay east of Raleigh. The pattern of scattered towns and small farms that characterized the east, characterized the state. After the war, while the east languished, the Piedmont Crescent grew; and by the 1890s, it was booming. Urban concentrations were building along several points of the corridor from Raleigh to Charlotte. The shift in North Carolina reflected the change occurring across the South in the late nineteenth century as coastal areas lost their primacy and interior places such as Atlanta, Birmingham, and Nashville replaced them. Railroads, industry, and the people and the innovative ideas they brought accounted in great part for these changes.

In some cases, the changes were enormous. By the early 1900s, more than 200,000 North Carolinians had left the farm to work in the textile mills of the Piedmont. They had given up a life of chronic poverty and uncertainty for "public" work where a regular paycheck, sometimes a house, and frequently a better diet improved their lives. The ten- or twelve-hour factory shifts might seem excessive to an observer today, but to those accustomed to the grinding routines of farm life, punching a time clock was not a particularly difficult adjustment. Competition between mills up and down the Piedmont Crescent enabled workers to use the region as a giant labor exchange. The Piedmont Crescent became what journalist Arthur W. Page characterized in 1907 as "one long mill village," where throughout the region, workers shared kin, experiences, and popular culture such as music and dance, often promoted through clear-channel radio station, WBT in Charlotte. Lacy Wright, who worked in Greensboro's White Oak Mill in the twenties and thirties, noted that "We had a pretty fair

picture, generally speaking, of what you might say was a 200-mile radius of Greensboro."

As the mill villages knitted the Piedmont Crescent together, larger nodes such as Durham, Winston-Salem, Greensboro, and Charlotte provided goods and services to support new economic enterprises. The Piedmont Crescent, a region of dispersed small towns and farms in the late nineteenth century, was emerging as an urban region by 1920.

The energy of North Carolina centered in the Piedmont Crescent. Entrepreneurial activity, inventions, and migration gravitated to the region's towns and cities after 1900. As the urban middle class expanded, the cities became focal points for statewide reform efforts, often led by middle-class white and black women. Organizations such as the Women's Christian Temperance Union and the Woman's Association for the Betterment of Public School Houses originated in Piedmont cities and expanded their work throughout the state. Daisy Denson of the Woman's Club in Raleigh contracted with planner Charles Mulford Robinson in 1912 to produce the first comprehensive city plan in North Carolina.

Blacks found opportunities in Piedmont Crescent cities as well. Aside from occupational and educational attractions, cities offered an array of voluntary associations and churches that enriched black life. While the eastern part of North Carolina provided the vast majority of black migrants to the North in the half century after 1910, blacks in the Piedmont moved from farms and small towns to places like Charlotte and Greensboro and stayed. Blacks in eastern North Carolina had many fewer nearby urban places to consider. Also, the tenor of race relations in the eastern portion of the state with its relatively large black population discouraged black ambition. A vicious race riot in Wilmington in 1898 reflected the harsh realities of race relations in eastern North Carolina.

This is not to say that Piedmont blacks encountered few frustrations when they moved to the Crescent's cities after 1900. Moving to town, they encountered an elaborate racial etiquette designed to separate them from whites and underscore their inferiority. Although many have viewed segregation as a remnant of Old South white supremacy, the institution in fact accompanied the modernization of North Carolina. As towns grew into cities, as neighborhoods spread beyond their customary boundaries, and as technology spurred inventions such as the electric trolley and the elevator, codified segregation emerged as a mechanism to separate the races and delineate their place in urban society. The words "white" and "colored" circumscribed the lives of blacks in the urban Piedmont Crescent. Worse were the signs without words: the black neighborhood where the pavement and city services ended; the dilapidated one-room wooden structure that served as a school for over one hundred black children; the parks blacks could not enter, the restaurants where they could not eat, and the jobs they could not apply for. In many Piedmont Crescent communities, the railroad defined the boundary line between whites and blacks as they lived their parallel but distinctive lives respectively on each side of the tracks.

Blacks lacked the political clout to challenge these indignities. In 1900 a new state constitution effectively disfranchised black North Carolinians. A relatively few blacks voted, almost all of these in the Piedmont Crescent cities where a solid community of middle class blacks existed. In the rural areas, especially in the eastern part of the state, blacks dared not venture to the polls.

Blacks built communities within the confining boundaries of segregation in the urban Piedmont Crescent. Every city in the Crescent had distinctive black neighborhoods such as Hayti in Durham and Brooklyn in

Charlotte, a black business district, black churches, black radio stations, black schools, and black entertainment. While these separate institutions reflected a segregated urban society, they also represented the strength and resources of a black community thrown back on itself and left to its own devices to function in the city as best as possible. The churches, businesses, schools, and voluntary associations for black men and women were training grounds for the civil rights movement and political organizing of the postwar era. These Piedmont Crescent cities experienced the first struggles for freedom such as school desegregation and the integration of public facilities. In Greensboro in February 1960, four black freshmen from North Carolina A&T sat in at the Woolworth lunch counter and triggered demonstrations across the South that eventually demolished segregation in public accommodations.

For blacks in rural North Carolina, especially in the eastern part of the state, life was very different. There were many fewer urban alternatives. Signs rarely appeared on the farm, but the grinding poverty, the absence of educational institutions, the high mortality rate, and the lack of job opportunities stunted the development of black institutions. Bereft of white friends, blacks in eastern North Carolina could only fall back on themselves and find very little to sustain them. Those young enough to escape did, and boarded the "Chicken-Bone Special" to resume life up North which, if only marginally better, at least held out a small hope for improvement. Those who could not wrestled with the debilities of an impoverished rural society. In the 1970s, a Navy recruiter in Northampton reported that "ninety percent of the students in this area flunk the Navy entrance test, whereas kids up in Guilford County [Greensboro] with just a GED do better than those 'down East' who have a high-school diploma."

The distinctive experiences of blacks in the Piedmont Crescent and "down East" reflected an even greater change that occurred in North Carolina after World War II. The differences between the two sections were apparent as early as 1920 when urbanization surged in the Crescent. But the gap widened after 1945.

North Carolina was becoming an urban state, especially in the Piedmont Crescent. Federal agricultural policies and mechanization changed the nature of Southern agriculture. In North Carolina, tenants had accounted for more than half the state's farmers in 1930; by 1980, the figure was less than 5 percent. The number of black tenants dropped from 25,000 in 1959 to 3,500 by 1970. Displaced farmers went North, especially from the eastern part of the state, or to the cities of the Piedmont. One in ten North Carolinians resided in towns or cities in 1900; by 1990, the majority of the state's residents were urban.

But urbanization occurred unevenly across the state. As the state's economy began to concentrate in the Piedmont Crescent after 1880, so did cities. The corridor from Raleigh to Charlotte, roughly following the tracks of the Southern Railway, emerged as the most urbanized portion of the state. Three major urban agglomerations appeared after World War II. The Triangle area encompassing Raleigh, Durham, and Chapel Hill became the location of the state's leading institutions of higher education and, in 1959, the site of the Research Triangle Park, a unique partnership between government, education, and private industry that served as a high-tech catalyst for the region. Further west, the Triad district, including High Point, Winston-Salem, and Greensboro, represented the heart of the Piedmont Crescent's industrial legacy. Charlotte, a sprawling egg-yolk of a city by 1990, benefited most from the postwar economic boom in North Carolina. Building on its proximity to a vast textile empire, Charlotte erected a financial network

that soon rivaled major cities outside the South. After World War II, the city used its rail connections and its reputation as a trucking center to become a major wholesale and transportation hub. Charlotte-Douglas International Airport and the extensive interstate highway network integrated the city's economy into national and international markets.

When, in 1993, the city marketed itself to the National Football League, civic leaders employed the regional logic that Greensboro textile worker Lacy Wright voiced two decades earlier. For Charlotte entrepreneurs, the Piedmont Crescent had become a vast, interconnected urban region, a market extending eastward to the Triangle area and south into South Carolina. While striking some as another example of Charlotte's overweening pride, the presentation made good historical sense.

Over the past century, the North Carolina Piedmont Crescent had in fact become a regional entity, tied together first by the railroad and then by an interstate highway. More important, it had become an urban region, the urban center of a historically rural state. The urban corridor extending westward from the Triangle corresponds to similar types of urbanization in the South: the area on the east coast of Florida from Miami north to West Palm Beach; the region along the Gulf of Mexico from Pensacola to New Orleans; and the area from Richmond east to the Virginia coast. The British call these districts "conurbations," relatively formless masses that ooze out into the countryside from various urban places and eventually grow together. They are much more extensive than census definitions of urban regions, and they are likely to look like ungainly stringbeans on a map. However, their residents share a lifestyle, a culture, and a commonality of interests that transcend traditional political boundaries.

Geographic compactness and regularity have much less political and social meaning than they once did. In the

nineteenth century, county seats were plotted to be no more than one day's ride from anywhere in the county. Inconsistent or nonexistent transportation and the dispersed pattern of settlement severely restricted the mobility of most North Carolinians. Their neighborhood was their world, and occasionally they left its familiar confines to venture to the county seat. Only rarely would they move beyond, except to leave for good.

A century later, advances in transportation, and urban and economic development have cracked the political geometry of the South. Regularity no longer reflects experience and perception. And regularity may not find favor in the courts as occurred in *Connor v. Johnson*, where the state of Mississippi drew five geographically symmetrical Congressional districts horizontally across the state, breaking up an irregularly-shaped historical region, the Mississippi Delta, and not coincidentally the power of its black majority. Regions of common interest have emerged cutting across traditional political boundaries, drawn together by common economic, social, and historical experiences, and connected by common transportation and communication networks.

The Piedmont Crescent in North Carolina is such a region. It has historical integrity; it is the most urban and economically the most developed region of the state. It is also the most diverse region of the state. Before the 1970s, North Carolina was a net exporter of people. The best and brightest of young North Carolinians often went North to pursue their careers because of constricted opportunities at home. This was especially true of black North Carolinians for whom discrimination and limited educational opportunities had closed out upward mobility. The situation changed after 1970. The accommodations won through civil rights legislation, and expanding educational and employment opportunities drew people into the Piedmont from around the country and the world. For the first time since before the Civil War,

North Carolina experienced a net in-migration of both blacks and whites in the 1970s, many of them taking up jobs in the booming Piedmont Crescent. The newcomers enriched the economy and culture of the Crescent's urban regions.

In contrast, what has occurred "down East," if anything, is de-urbanization. Plants and Wal-Marts usually locate out on the by-pass. The towns of eastern North Carolina are no longer the central places they once were: the place to go on a Saturday night, the place to shop, and the place to work. Few people have migrated to these regions except to rejoin families in old age or retire at a resort area along the coast. This is a stagnant, if not declining region, deficient in many of the basic cultural, health, and educational facilities that characterize even the smaller places of the Piedmont Crescent corridor. The energy of newcomers, of innovation and invention, continues to ignore eastern North Carolina.

These have become two very different regions. The issues that concern Piedmont Crescent citizens, such as traffic, density, and zoning, are much less relevant for the residents "down East." Both black and white residents of the respective sections have different needs, interests, and aspirations. Black and white Piedmont residents have more in common with each other than with their counterparts in the east. And the trends of the post-industrial economy will continue to favor the Piedmont Crescent into the next century.

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Defendant's Exhibit 404

Racial Differences in Candidate Preferences in North Carolina Elections

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Elections in North Carolina in which voters have been presented with a choice between or among African American and white candidates reveal a persistent pattern of racially polarized voting across the state. This report contains the results of analyses of recent elections to the United States House of Representatives in North Carolina, as well as recent statewide and state legislative elections in the state. These analyses show consistent differences in the candidate preferences of North Carolina voters, with African American voters preferring the African American candidates while the non-African American, primarily white, voters have preferred their white opponents.

An analysis has also been performed on elections in which the voters in Robeson County, the area of the state with the highest concentration of Native American residents, have been presented with a choice between or among Native American, African American, and/or white candidates. Voting across that county in elections to countywide and statewide offices has also been divided along group lines. Native American voters have had a preference for Native American candidates, African American voters for African American candidates, and the other, primarily white, voters have preferred white candidates.

Elections to the United States House of Representatives

All of the Democratic primary and runoff primary elections for seats in the United States House of Repre-

sentatives since 1980 in which North Carolina voters have been presented with a biracial choice of candidates have been analyzed, as well as the general and special elections presenting such a choice during that time period. This includes a total of eight elections, four primary and two runoff primary elections, one general election, and one special election to fill an unexpired term.

Methodology

These U.S. House elections have been subjected to both bivariate ecological regression analyses and homogeneous precinct analyses, the same methodologies employed in the *Thornburg* v. *Gingles* litigation, 478 U.S. 30, 52-53 (1986). These analyses provide evidence as to whether there is "a consistent relationship between [the] race of the voter and the way in which the voter votes," or more simply, whether "black voters and white voters vote differently," which is the definition of "racially polarized voting" adopted by the United States Supreme Court in the *Thornburg* decision (at 53 n.21). The methods have been applied so as [to] provide a comparison in the level of support for the various candidates among African American voters and non-African American voters because section 2 of the Voting Rights Act concerns the opportunity of the protected class to participate and elect candidates of its choice equal to that of the "other members of the electorate." A description of these analytic techniques is provided in part I of the Appendix attached to this report.

The analyses reveal that voting was racially polarized in all of these congressional elections. The results of the regression analyses of these elections are reported in Table 1A, while the results of the homogeneous precinct analyses are reported in Table 1B. Identified in each of the tables are the particular elections analyzed and the names of the African American candidates in these elections. The columns labelled "% of non-African

American Votes" and "% of African American Votes" contain the estimated percentage, respectively, of non-African Americans and African Americans voting in these elections that voted for the African American candidate. Table 1C provides descriptive information for each election analyzed, including the names of all of the candidates, their race and party affiliations, and the number of votes each received. In addition, where appropriate, the counties or portions of counties included within the district is provided.

Also reported in Table 1A, along with the regression-based estimates of the support provided by each group, are the values of the correlation coefficient measuring the relationships between the percentage of the votes received by the African American candidates in each precinct and the percentage of the registered voters in the precincts who were African Americans. The correlation coefficient can range in value from 1.0 to -1.0. A value of 1.0 indicates that as the African American registration percentage increases across a set of precincts, there is a uniform increase in the share of the votes received by the candidate, while a value of -1.0 indicates a uniform decrease in the share of the votes. A value of 0.0 would indicate no relationship between the vote percentages and the registration percentages across precincts. Virtually all correlation coefficients reported in this and the following tables are statistically significant. Any correlations that are not statistically significant are identified in the tables by an "ns" next to the value reported for that coefficient.

Findings

The most recent biracial congressional election occurred in 1992 in District 1, a newly created African American majority district. Four African American candidates sought the Democratic nomination in the primary election in that district, along with three white candidates. Based on a regression analysis of the votes

cast in all of the precincts in this election, the four African American candidates together received an estimated 89.05 percent of the votes cast by African Americans, but only 5.01 percent of those cast by non-African Americans (Table 1A). The estimates derived from the votes cast in only the homogeneous precincts reveal a similar division in the vote. The African American candidates received 90.31 percent of the votes cast in the African American precincts (all those in which African Americans constituted over 90 percent of the registered voters) but only 10.37 percent of those cast in the non-African American precincts (all those in which African Americans constituted less than 10 percent of the registered voters) (Table 1B).

The most preferred candidate among the African American voters in this primary was Eva Clayton, who received an estimated 51.88 percent of the votes cast by African Americans in the regression analysis, and 53.97 percent in the homogeneous precinct analysis. Her support among the other voters in this primary is estimated to have been only 1.38 percent in the regression analysis, and 6.22 percent in the homogeneous analysis.

Ms. Clayton finished second in the primary and faced a white candidate, Walter B. Jones, Jr. in a runoff election for the Democratic nomination. The vote in this election was split clearly along racial lines as well. In the regression analysis, Ms. Clayton's vote among African Americans increased to an estimated 93.26 percent, while in the homogeneous precinct analysis it increased to 96.26 percent. Despite facing only a single opponent in the runoff, her support among non-African Americans was even lower in this election than in the initial primary. The regression analysis reveals that she received virtually no support among the non-African Americans voting in this election, while the homogeneous precinct estimate for these voters is just 4.23 percent.

Ms. Clayton won the runoff election and therefore was the Democratic nominee in the general election, which was also contested by a white Republican, Ted Tyler, and another African American, C. Barry Williams, the Libertarian Party candidate. Once again, Ms. Clayton was the choice of the African American voters, while her white opponent was the choice of the other voters. In both the regression and homogeneous precinct analyses, Ms. Clayton is again estimated to have received over 90 percent of the votes cast by African Americans (96.22 percent in the regression analysis, and 97.94 percent in the homogeneous). Among the other voters, however, her support is estimated to have been 33.93 percent in the regression analysis and 34.80 percent in the homogeneous. Over 60 percent of the non-African American voters voted for Mr. Tyler. Ms. Clayton led in the overall vote, however, and therefore won the seat in Congress.

Ms. Clayton, Mr. Tyler, and Mr. Williams also competed that same day to fill an unexpired term in the previous District 1. The vote in this special election was also racially divided. The regression estimate of Ms. Clayton's vote among the African Americans participating in this election is 98.46 percent, while the homogenous precinct figure is 97.86 percent. Her support among the other voters is estimated to be 41.15 percent in the regression analysis, and 44.36 percent in the homogenous. A majority of the non-African Americans voting in this special election cast their ballots for Mr. Tyler. Ms. Clayton won the overall vote in this special election as well, and therefore completed the unexpired term prior to assuming the seat for the newly created District 1.

The racial divisions in the votes in these four elections in 1992 were not a unique occurrence. Racial divisions were also present in all four congressional elections during the 1990s in which North Carolina voters had a choice between or among African American and white candidates. Voters in the Democratic primaries in two districts, Districts 2 and 4, were presented with a biracial

choice of candidates in 1984. In District 2, an African American candidate, Kenneth B. Spaulding, sought the Democratic nomination, as did one white candidate, Tim Valentine, Jr.. Spaulding was the choice of the African American voters, while Valentine was the choice of the other voters. The regression estimate of Spaulding's support among African American voters in this primary is 89.70 percent, while the homogeneous estimate is 98.06. His vote among the non-African American voters is estimated, in the regression analysis, to be 14.10 percent, while the homogeneous analysis places it at 22.32. Mr. Spaulding lost the election to Mr. Valentine.

Two African Americans, Howard Lee and John Winters, Jr., sought the Democratic nomination in the primary in District 4 that year. They had one white opponent, Ike Andrews. Lee and Winters together are estimated through regression to have received 82.43 percent of the votes cast by African Americans in this primary, with Mr. Lee being their most preferred choice, with 68.57 percent of their votes. The corresponding estimates from homogeneous precincts are 88.66 percent for the two African American candidates combined, with 71.88 percent for Lee alone. The vote for Lee among the non-African Americans voting in this primary is estimated to be 24.32 percent in the regression analysis, and 28.75 in the homogeneous analysis. The non-African American vote for Winters was estimated to be 9.17 percent and 9.96 percent by these respective methods. The candidate of choice and of the non-African American voters, Mr. Andrews, won this election.

In 1982 District 2 was contested by another African American candidate, H. M. (Mickey) Michaux. His opponents were two white candidates, James Ramsey and Tim Valentine. Mr. Michaux is estimated through regression to have received 88.55 percent of the votes cast by African Americans in this election, while the homogenous precinct analysis reveals that he received 97.64 percent of the votes cast by these voters. His

support among the other voters was estimated to be 13.88 percent in the regression analysis, and 18.91 percent in the homogeneous analysis. Mr. Michaux finished first in this initial primary, and faced Mr. Valentine in a runoff election for the nomination. The runoff vote was also divided along racial lines, with Michaux estimated to have received 91.48 percent of the African American vote in the regression analysis, and 98.87 percent in the homogeneous. His vote among the non-African Americans was very similar to that which he received in the initial primary. The regression-based estimate of his non-African American vote is 13.12 percent, while the homogeneous precinct estimate is 17.42. Although first in the initial primary, Mr. Michaux lost the runoff election.

The regression and homogeneous precincts analyses of these eight congressional elections clearly demonstrate that when North Carolina voters have been presented with a choice between or among African American and white candidates for Congress, the African American voters have consistently preferred the African American candidates, and the other voters have consistently preferred the white candidates. These congressional elections in North Carolina have been marked by a persistent pattern of racially polarized voting. [footnote omitted]

Statewide Elections

A pattern of polarized voting is also evident in recent elections in which the voters across the state have been presented with the same biracial field of candidates. As a supplement to the analyses of congressional elections, the candidate choices of African American and other voters have been analyzed in all such statewide elections held since 1988. These elections have involved the high profile offices of President of the United States and United States Senator, and the low profile offices of state Auditor and judge on the Court of Appeals. The

specific elections to high profile offices were the Democratic primary, runoff, and general election for United States Senator in 1990, and the state's Democratic presidential preference primary in 1988. The elections to low profile offices were the 1992 Democratic primary and general election for state Auditor, and the 1990 general election for a judgeship on the state Court of Appeals.

The results of the regression analyses of these seven statewide elections are reported in Table 2A, while the results of the homogeneous precinct analyses are reported in Table 2B. Descriptive information on these elections is provided in Table 2C. As was the case with the elections to the U.S. House of Representatives, each of these statewide contests has been marked by racially polarized voting. African Americans and other voters differed in their candidate preferences in all seven of these contests.

The most recent of these elections involving a high profile office were the U.S. Senate contests in 1990. Two African Americans, Harvey B. Gantt and Robert L. Hannon, sought the Democratic nomination for that position, as did four white candidates. The African American voters in this primary are estimated through regression to have given Mr. Gantt 70.67 percent of their votes. The corresponding figure derived from the homogeneous precincts is 91.24. This preference for Mr. Gantt was not shared by the other voters, however, who are estimated through regression to have cast 22.61 percent of their votes for him, and through homogenous [sic] precincts, 28.15 percent. (Mr. Hannon is estimated, by both methods, to have received less than 2.0 percent of the votes from either group.) Gantt placed first in this initial primary, receiving 37.52 percent of the votes overall.

Gantt's runoff opponent was white candidate Mike Easley. Once again, Gantt was the choice of the African American voters, but not the other voters. In the regression analysis of this runoff election, Gantt's vote among the African Americans casting ballots increased to 86.29 percent, while in the homogeneous precincts, it increased to 98.38 percent. Among the non-African Americans, however, Gantt received an estimated 38.25 percent of the votes in the regression analysis, and 45.97 percent in the homogeneous precincts. Overall he received 56.89 percent of the vote and won the right to be the Democratic Party's nominee in the general election against white Republican Jesse A. Helms.

The African American support for Gantt in the general election was, according to both estimation procedures, around 98 percent (98.14 percent in the regression analysis, and 98.07 percent in the homogeneous analysis). Gantt's level of support among the non-African American voters, however, was insufficient for him to be elected. In the regression analysis, he is estimated to have received 36.73 percent of the non-African American vote, and in the homogeneous analysis, 39.46. [footnote omitted] (An exit poll conducted by Voter Research and Surveys provided similar estimates of the racial division in the vote in this senatorial election. In this poll of 1,267 voters that day, 96.20 percent of the African American respondents voted for Gantt, compared to 34.13 percent of the non-African American respondents.) [footnote omitted] Gantt was left with only 47.45 percent of the overall vote, and the senate seat was won by Mr. Helms.

The other biracial contest for a high profile office was the 1988 Democratic presidential primary. An African American, Jesse Jackson, was a candidate in this election along with six white candidates. The regression-based estimate of the Rev. Jackson's vote among the African American voters in this statewide primary is 89.32 percent, while the corresponding estimate based on the homogeneous precincts is 96.66. Rev. Jackson was not the choice of the other voters, however. His vote

among non-African Americans is estimated to have been 5.89 percent in the regression analysis, and 12.49 percent in the homogeneous analysis. Jackson finished a close second to white candidate Al Gore overall, with 32.97 percent of the votes.

In contrast to elections for these high profile offices, voters in elections to low profile statewide offices usually have less information about candidates. Voting in these elections therefore is more likely to be influenced by the party affiliations of the candidates. This is especially true in states like North Carolina, where the ballot provides the voters with the option of casting a straight party vote.

The most recent of the biracial elections to a low profile office in North Carolina was the contest for state Auditor in 1992. An African American candidate, Ralph Campbell, sought the Democratic nomination for that office, along with two white candidates. In the primary election, Mr. Campbell is estimated to have received 65.01 percent of the votes cast by African Americans in the regression analysis, and 77.29 percent in the homogeneous precincts. He was not the choice of the other voters, however. His vote among the non-African Americans is estimated to have been 31.14 percent in the regression analysis and 34.42 in the homogeneous analysis. Mr. Campbell received 41.54 percent of the overall vote, which was sufficient to win the party's nomination under North Carolina's 40 percent requirement.

In the general election, Mr. Campbell faced white Republican J. Vernon Abernethy. The voters responded in a racially divided manner in this election as well. While the regression analysis estimates that Mr. Campbell received virtually all of the African American votes cast in this election, and the homogeneous analysis places his vote among African Americans at 97.47 percent, he again was not the choice of the other voters. The regression-based estimate of Campbell's vote among

the non-African American voters is 43.16 percent, while the estimate based on homogeneous precincts is 44.06 percent. Despite losing the vote among the non-African Americans, Mr. Campbell received 53.22 percent of the overall vote and was elected Auditor.

A second biracial election was on the statewide ballot along with the U.S. Senate contest in the 1990 general election. African American Democrat, Clifton E. Johnston, competed with a white Republican, Carter T. Lambeth, for a seat on the state Court of Appeals. Mr. Johnston is estimated to have received almost all of the votes cast by African Americans (virtually 100 percent in the regression analysis and 98.24 in the homogeneous analysis), but as was the case with Gantt, Jackson, and Campbell, he also was not the choice of the other voters. The regression-based estimate of Johnson's vote among the non-African Americans is 43.06 percent, while the homogeneous precinct estimate is 44.22 percent. Mr. Johnson received 54.26 percent of the votes overall, however, and won the judgeship.

As was the case with elections to the U.S. House, voting in recent statewide elections involving a biracial choice of candidates, regardless of whether they have been for high profile of low profile offices, has been marked by racially polarized voting. While these racial divisions have not precluded African American candidates from winning low profile statewide offices, these racial divisions have resulted in the defeat of African American candidates in the elections to high profile offices.

State Legislative Elections

In addition to the congressional and statewide elections, state legislative elections in which voters have been presented with a biracial choice of candidates since 1988 have been analyzed. A total of 20 such elections in single-member legislative districts and 15 in multi-

member districts have been examined. These are all of the state legislative elections in 1988, 1990, and 1992 involving a biracial choice of candidates for which sufficient data were available for analysis. [footnote omitted] These elections have also been marked by a persistent pattern of racially polarized voting. [footnote omitted]

Single-Member Districts

The results of the regression analyses of the legislative elections in single-member districts are reported in Table 3A, while the results of the homogeneous precincts analyses are reported in Table 3B. Descriptive information on the elections is provided in Table 3C. The regression results reveal that in all 20 of these elections the African American candidates were the preferred candidates of the African American voters. In none of these elections, however, was that choice of an African American shared by the non-African American voters. For example, in House District 1, in the latest Democratic primary, 1992, African American candidate Charles L. Foster is estimated in the regression analysis to have received 92.83 percent of the votes cast by African Americans, compared to 26.54 percent of those cast by the other voters. Mr. Foster's only opponent, white candidate Vernon G. James, was the choice of the other, non-African American voters.

Estimates from homogeneous precincts, where available, confirm these racial divisions in the vote. For example, in the Democratic primary in House District 1 in 1992, the estimate of Mr. Foster's vote among African Americans is 96.67 percent, while his vote among the non-African Americans is placed at 33.36 percent. The only homogeneous precinct estimate that does not confirm the racial division in the choice of candidates revealed in the regression analyses is that for the 1992 general election in Senate District 41. The homogeneous estimate of the vote among the non-African Americans for the African American candidate in that election, C.R.

Edwards, is 54.22 percent, whereas the regression estimate is 44.53 percent. This homogeneous estimate of Mr. Edwards' non-African American support, however, is based on a single precinct.

Multi-Member Districts

Analyses of the elections in the multi-member districts have had to be adjusted to reflect the fact that voters in these elections were allowed, but not required, to cast as many votes as there were seats apportioned to the particular districts. In this multiple vote context, the percentage of the *total votes* cast by a group of voters for a particular candidate is not the same, as was the case in the above analyses, as the percentage of the group's *voters* that voted for that candidate. A different approach must be taken, therefore, to determine the relative preferences of the voters of the different groups in these multi-seat elections. While this approach will not allow us to estimate the percentage of those voting in the legislative election itself who preferred a particular candidate, it will allow us to determine the relative rankings of the candidates among the voters of each group, and therefore whether the candidates of choice in these elections were the same for each of the groups.

In some of the multi-member districts, records have been kept that report the number of voters who came to the polls on the day legislators were elected. When those figures have been available, an analysis has been performed that estimates the percentage of the African Americans and non-African Americans signing in to vote that day that voted for a particular candidate. These percentages are not based, as noted above, on only those voting in the legislative election, but rather on all of those signing in to vote. This means, for example, that in a Democratic primary election, the denominator on which the percentage is based would include not only those voting in the legislative contest, but also those people who signed to vote but could not vote in that

primary because they were not registered as Democrats. This procedure does not allow us to determine, however, which of the candidates would have been elected by the African American voters and which by the non-African American voters. Ten of the elections have been analyzed in this manner.

When election day sign-in records have not been available for all of the precincts in a district, a different measure of turnout on election day has been employed. This is, for each precinct, the number of votes cast in the simultaneous single vote election that day that drew the largest number of votes across the county in which the precinct is located. Five elections have been analyzed in this manner. A description of the procedures employed to analyze the multi-vote elections is provided in part II of the Appendix.

The results of the regression analyses of the multi-seat elections for which sign-in data were available are reported in Table 4A, while the results of the homogeneous precinct analyses of these elections are reported in Table 4B. Descriptive information about these elections is provided in Table 4C. The regression results for the elections analyzed using the votes cast in the election contests drawing the most votes are reported in Table 5A, and the corresponding homogeneous results in Table 5B. These tables contain the estimated support for all of the candidates in these elections, not just the African American candidates, in order to reveal which of the candidates would have been elected by the respective groups of voters. Descriptive information about these elections is reported in Table 5C.

The regression results for the ten elections employing sign-in data show an African American candidate to be the candidate that received the most support from African American voters in all ten of these elections. With only a single exception, that same candidate would not have been included among those either nominated in

the Democratic primary election, or elected in the general election, if only the votes of the non-African American voters had been counted. For example, in the 1992 Democratic primary for the two seats in Senate District 13, Ralph A. Hunt, an African American, received a vote from more African American voters than his two white opponents. Hunt is estimated to have received a vote from 94.75 percent of the African Americans signing in to vote that day, whereas his white opponents, Wilbur P. Gulley and John W. Hamby, Jr., are estimated to have received votes from 20.28 percent and 2.18 percent, respectively. Hunt finished last among the three candidates, however, among the non-African American voters. He is estimated to have received a vote from 23.74 percent of the non-African Americans who signed in to vote, compared to 40.24 percent for Gulley and 32.07 percent for Hamby. If only the votes of the non-African Americans had counted, therefore, Hunt would have been eliminated as a result of the primary vote.

Hunt obviously benefitted from single-shot voting by many of his African American supporters. It is estimated through the regression analysis that at least 72.29 percent of the African Americans signing in to vote cast a vote for Hunt but withheld their remaining vote from either of the candidates competing with him. (If it is assumed that none of the 20.28 percent of the African Americans that voted for Gulley was among the 2.18 percent that voted for Hamby, and that all of these African Americans voting for a white candidate also voted for Hunt, then subtracting this 22.46 percent from the 94.75 percent that voted for Hunt results in 72.29 percent of the African Americans voting for Hunt and no other candidate in this legislative election). Hunt's decisive margin among the African American voters propelled him to a first place finish in the primary and therefore a spot in the subsequent general election, along with Mr. Gulley.

In the 1992 general election, Hunt and Gulley faced two white Republicans, Victoria Peterson and Melodie A. Parrish. Hunt again received more votes from the African American voters signing in to vote that day than any of the other candidates. He is estimated to have received a vote from 95.12 percent of them. He was again the last place candidate among the non-African American voters, however, receiving a vote from an estimated 33.67 percent of these voters. The two candidates receiving the most votes from the non-African American voters were the Republicans, Parrish and Peterson. Ms. Parrish is estimated to have received a vote from 45.69 percent of the non-African Americans, and Ms. Peterson from 42.22 percent. Gulley received a vote from 39.16 percent of them. If only the votes of the non-African Americans had been counted, Hunt would have been defeated in the general election. His margin among the African Americans, however, was decisive, as he finished second to Mr. Gulley and won one of the district's two seats.

The only instance, across these ten elections, of an African American candidate being included among the candidates who would have been elected by non-African American voters occurred in the general election in three-member House District 23 in 1992. Three Democratic candidates faced two candidates from the Libertarian Party in that election. Mickey Michaux, an African American Democrat, finished third in the non-African American vote in that contest, ahead of the two candidates of the minor party. This is the only exception to the pattern of racial differences in the candidate choices of the voters in these ten multi-seat, multi-vote elections. The estimates based on the votes cast in homogeneous precincts, in districts where such precincts exist (see Table 8), support the same conclusions about the voters' preferences in these elections as do the regression results.

The analyses of the five multi-seat elections employing the number of votes cast in the simultaneous single vote election contest provide evidence of the same pattern of candidate preferences. The results, reported in Table 5A, show once again that the candidate receiving the most votes from African American voters was always an African American, and that same candidate would have been defeated, either in the primary or general election, if only the votes of the non-African American voters had been counted. The results of homogeneous precinct analyses, when available (see Table 5B), are again consistent with the regression results.

The analyses of biracial elections to state legislative seats has revealed a consistent pattern of racially polarized voting, as have the analyses of the biracial congressional and statewide elections. Racial divisions in candidate preferences, it must be concluded, are a persistent phenomenon across elections in North Carolina.

Robeson County Elections

An analysis has also been conducted of elections in Robeson County, the county in North Carolina with the highest concentration of Native American residents (38.52 percent, according to the 1990 Census). Elections to countywide offices from 1982 through 1992 in which voters have had a choice between or among Native American, African American, and/or white candidates have been analyzed in order to assess the extent to which Native American voters share the same candidate preferences as African Americans and voters who are neither Native nor African American (a primarily white group hereinafter referred to as "other" voters). In addition, voting within Robeson County has been examined in the seven statewide elections involving African American and white candidates that were analyzed above to determine the candidate preferences of the Native American voters in these elections.

In order to estimate the level of support for the various candidates among the Native American voters as well as the African American and the other voters, a multivariate rather than bivariate regression analysis has been performed on these elections. These multivariate analyses include the percentage of registered voters in the precincts at the time of these elections that was Native American, as well as the percentage that was African American. A description of this multivariate procedure is provided in part III of the Appendix to this report.

Table 6A contains the regression-based estimates of the support for Native American and African American candidates in the elections to countywide offices. Partial correlation coefficients, which measure the relationship between the vote within the precincts and either the African American registration within the precincts or the Native American registration, are reported along with the regression-based estimates of each group's support for the respective candidates. The homogeneous precinct results for these elections are reported in Table 6B. Homogeneous Native American precincts are those in which Native Americans constitute over 90 percent of the registered voters at the time of the election. Descriptive information about these elections is contained in Table 6C. Tables 7A and 7B contain the results of the regression and homogeneous precinct analyses of the votes for the African American candidates in statewide elections within Robeson County.

Nine elections to countywide offices have been analyzed. Four of these presented voters with a choice between or among Native American and white candidates. Three involved a choice between or among African American and white candidates. One of the remaining elections involved a choice among candidates of all three racial groups, while the other involved a choice between a Native American and an African American.

Native American voters supported the Native American candidates in all of these elections. In the two elections involving a choice between a Native American and an African American candidate, the candidate preferences of Native American and African American voters were divided. In the Democratic primary in 1990 for Coroner, the regression-based estimate of the support for the Native American candidate, Billy Olendine, among Native American voters is 85.07 percent, while the estimate based on homogeneous precincts is 83.28 percent. African Americans, in contrast, preferred the African American candidate in this election, Shulten Maultsby. The regression-based estimate of their support for Maultsby is 93.08 percent, while the homogeneous precinct estimate is 87.24 percent. The remaining voters in this election preferred the white candidate, B. Leroy Freeman. The regression estimate of their support for Freeman is 85.79 percent, while the homogeneous estimate is 85.52 percent.

The 1988 Democratic primary for District Court Judge was the other election involving both an African American and a Native American candidate. Native American voters are estimated, through regression analysis, to have cast virtually all of their votes for the Native American candidate in this election, Bobby L. Locklear, who received 98.22 percent of the votes cast in the Native American homogeneous precincts. African American voters supported Locklear's African American opponent, Maceo C. Kemp. The regression-based estimate of their vote for Kemp was 64.19 percent, the homogeneous precinct estimate, 63.71. The remaining voters favored Locklear over Kemp. The regression estimate of their vote for Locklear is 41.95 percent, the homogeneous estimate, 36.13.

The Native American preference for Native American candidates was evident in the four elections in which the choice was between Native American and white

candidates as well. In the 1990 general election for Coroner, Native Americans supported the Republican candidate, Native American Lindberg Locklear, over Freeman, the winner of the Democratic primary. In the regression analysis, an estimated 66.10 percent of the Native American vote went to Locklear, while in the homogeneous precinct analysis, it is estimated to have been 68.09. In comparison, Locklear is estimated to have received virtually no votes from African Americans in the regression analysis, and only 9.64 percent of the votes based on the African American homogeneous precincts. The remaining voters preferred Freeman as well. Locklear received an estimated 16.64 percent of their votes, based on regression, and 17.63 based on homogeneous precincts.

The other three elections involving Native American and white candidates reveal the same voting pattern. In the 1990 Democratic primary for Sheriff, and in the 1984 Democratic primary and runoff elections for District Court Judge, Native American voters preferred the Native American candidates while African American voters, as well as the other voters, preferred their white opponents.

The three elections involving a choice between African American and white candidates to countywide offices reveal once again the preference of African American voters for African American candidates. In all three of these elections, the Democratic primaries for Register of Deeds in 1992, Clerk of Court in 1990, and Coroner in 1986, African American voters preferred the African American candidate. This preference was not shared by voters who where neither African American nor Native American in any of these elections. Native Americans split their votes closely between the African American and white candidates in two of these elections, and voted decisively for the white candidate in the third. In the two-candidate 1992 Democratic primary for Register

of Deeds, the Native American vote for the African American candidate, Thomas Jones, is estimated to have been 49.10 percent in the regression analysis, and 49.62 percent in the homogeneous analysis. In the two-candidate primary for Clerk of Court in 1990, the Native American vote for the African American candidate, Larry Graham, is estimated to have been 52.03 percent in the regression analysis, and somewhat higher, 58.78 percent, in the homogeneous analysis. In the remaining election, the two-candidate 1986 primary contest for Coroner, the estimated Native American vote for the African American candidate, Vester Maultsby, is 29.77 percent based on regression, and 33.56 percent based on homogeneous precincts.

These analyses of elections to offices within Robeson County reveal that each respective group of voters has preferred the candidates from within that group. Native Americans in Robeson County, like African Americans and the other, primarily white, voters both within Robeson County and across the state, prefer candidates from within their own group. When presented with a choice between African American and white candidates, the Native American voters in Robeson County have not been as supportive of the African American candidates as have the African American voters, but have been more supportive of these candidates than the other, remaining voters.

This pattern of support for African American candidates varying by group is replicated in the analyses of the seven statewide elections involving African American and white candidates. The analyses of the Robeson County vote in these elections, which do not involve local candidates, reveal that the level of support for the African American candidates by Native Americans, while varying greatly across elections, is consistently less than that of the African American voters but more than that of the other voters (see Tables 7A and 7B). Native

American support for African American candidates therefore has fallen between that of the African American voters and the other, primarily white, voters in all 16 of the Robeson County elections analyzed.

Conclusion

Elections in North Carolina in which voters have been presented with a choice between or among African American and white candidates have been marked by a persistent pattern of racially polarized voting. This has been true of elections to the U.S. House of Representatives, of statewide elections to both high profile and low profile offices, and of state legislative elections, regardless of whether they were in single member or multimember districts. A total of 50 such elections have been analyzed (excluding those in Robeson County), and in 49 of them, the candidate choices of the voters divided along racial lines. The only exception to this pattern was one general election, in a three-seat legislative district, in which the options were limited to three Democratic candidates and two minor party (Libertarian) candidates.

Elections in Robeson County have also been marked by polarized voting. Native American voters in Robeson have had a preference for Native American candidates, African American voters for African American candidates, and the other, primarily white voters, have preferred white candidates. When presented with a choice between Native American and white candidates, the African American voters in Robeson County have consistently preferred the white candidates. Native American voters, when presented with a choice between African American and white candidates, have been less supportive of the African American candidates than the African American voters, but more supportive than the other, primarily, white voters.

Race is obviously a fundamental division in North Carolina politics. Racially polarized voting occurs across

the state, and across types of elections. The polarized voting found in *Thornburg* v. *Gingles* is not a phenomenon of the past; it remains prevalent in the state today. Racial divisions, unfortunately, continue to be a central feature of elections in North Carolina.

Defendants' Exhibit 406

NORTH CAROLINA MUNICIPALITIES WITH POPULATION OVER 2,300 RANKED BY SIZE, 1990

RANK	MUNICIPALITY	COUNTY(IES)	JULY 1990 ESTIMATE
1	CHARLOTTE	MECKLENBURG	397,976
2	RALEIGH	WAKE	209,971
3	GREENSBORO	GUILFORD	184,278
4	WINSTON-SALEM	FORSYTH	143,841
5	DURHAM	DURHAM ORANGE	137,195
6	JACKSONVILLE	ONSLOW	78,092
7	FAYETTEVILLE	CUMBERLAND	75,928
8	HIGH POINT	FORSYTH GUILFORD DAVIDSON RANDOLPH	69,670
9	ASHEVILLE	BUNCUMBE	61,711
10	WILMINGTON	NEW HANOVER	55,712
11	GASTONIA	GASTON	54,831
12	ROCKY MOUNT	EDGECOMBE NASH	49,101
13	GREENVILLE	PITT	45,239
14	CARY	WAKE	44,373
15	GOLDSBORO	WAYNE	41,868
16	BURLINGTON	ALAMANCE	39,582
17	CHAPEL HILL	DURHAM ORANGE	38,872
18	WILSON	WILSON	36,979
19	KANNAPOLIS	CABARRUS ROWAN	31,403
20	HICKORY	BURKE CATAWBA	28,377
21	CONCORD	CABARRUS	28,266
22	KINSTON	LENOIR	25,274

RANK	MUNICIPALITY	COUNTY(IES)	JULY 1990 ESTIMATE
23	SALISBURY	ROWAN	23,143
24	STATESVILLE	IREDELL	20,594
25	HAVELOCK	CRAVEN	20,202
26	LUMBERTON	ROBESON	18,629
27	NEW BERN	CRAVEN	17,427
28	MONROE	UNION	16,631
29	LEXINGTON	DAVIDSON	16,625
30	ASHEBORO	RANDOLPH	16,460
31	THOMASVILLE	DAVIDSON	15,954
32	ROANOKE RAPIDS	HALIFAX	15,721
33	HENDERSON	VANCE	15,624
34	EDEN	ROCKINGHAM	15,250
35	GARNER	WAKE	15,078
36	MORGANTON	BURKE	15,067
37	ALBEMARLE	STANLY	14,965
38	SHELBY	CLEVELAND	14,678
39	SANFORD	LEE	14,590
40	ELIZABETH CITY	CAMDEN PASQUOTANK	14,423
41	LENOIR	CALDWELL	14,218
42	REIDSVILLE	ROCKINGHAM	14,011
43	MATTHEWS	MECKLENBURG	13,716
44	BOONE	WATAUGA	12,948
45	KERNERSVILLE	FORSYTH GUILFORD	11,686
46	LAURINBURG	SCOTLAND	11,655
47	MINT HILL	MECKLENBURG	11,628
48	CARRBORO	ORANGE	11,611
49	TARBORO	EGDECOMBE	11,042
50	GRAHAM	ALAMANCE	10,389
51	MOORESVILLE	IREDELL	9,418
52	ROCKINGHAM	RICHMOND	9,392
53	NEWTON	CATAWBA	9,330

RANK	MUNICIPALITY	COUNTY(IES)	JULY 1990 ESTIMATE
54	WASHINGTON	BEAUFORT	9,170
55	SOUTHERN PINES	MOORE	9,162
56	KINGS MOUNTAIN	CLEVELAND GASTON	8,767
57	BELMONT	GASTON	8,448
58	DUNN	HARNETT	8,366
59	HOPE MILLS	CUMBERLAND	8,299
60	CLINTON	SAMPSON	8,197
61	OXFORD	GRANVILLE	8,042
62	MOUNT HOLLY	GASTON	7,848
63	SPRING LAKE	CUMBERLAND	7,680
64	SMITHFIELD	JOHNSTON	7,557
65	FOREST CITY	RUTHERFORD	7,486
66	ROXBORO	PERSON	7,338
67	HENDERSONVILLE	HENDERSON	7,305
68	MOUNT AIRY	SURRY	7,162
69	ARCHDALE	GUILFORD RANDOLPH	6,938
70	LINCOLNTON	LINCOLN	6,873
71	WAYNESVILLE	HAYWOOD	6,762
72	BLACK MOUNTAIN	BUNCOMBE	6,298
73	LEWISVILLE	FORSYTH	6,213
74	HAMLET	RICHMOND	6,191
75	MOREHEAD CITY	CARTERET	6,077
76	CLEMMONS	FORSYTH	6,032
77	WAKE FOREST	WAKE	5,811
78	WILLIAMSTON	MARTIN	5,499
79	CONOVER	CATAWBA	5,481
80	BREVARD	TRANSYLVANIA	5,398
81	EDENTON	CHOWAN	5,277
82	PINEHURST	MOORE	5,121
83	WHITEVILLE	COLUMBUS	5,076
84	APEX	WAKE	5,025
85	SILER CITY	CHATHAM	4,824

Defendants' Exhibit 440

MINIMUM PERCENTAGE OF WHITE AND BLACK RESIDENTS THAT LIVE IN URBAN AREAS CONGRESSIONAL DISTRICT 12, 1992 PLAN, NORTH CAROLINA*

TOTAL WHITE POPULATION . . . 230,889

TOTAL RURAL POPULATION . . . 75,295

ASSUME ALL RURAL POPULATION IS WHITE.

MINIMUM WHITE URBAN POPULATION . . .
230,889 - 75,295 = 155,594

MINIMUM WHITE URBAN PERCENTAGE . . .
155,594/230,889 = 67.4%

TOTAL BLACK POPULATION . . . 312,791

TOTAL RURAL POPULATION . . . 75,295

ASSUME ALL RURAL POPULATION IS BLACK.

MINIMUM BLACK URBAN POPULATION . . .
312,791 - 75,295 = 237,496

MINIMUM BLACK URBAN PERCENTAGE . . .
237,496/312,791 = 75.9%

*1990 CENSUS OF POPULATION AND HOUSING, CHARACTERISTICS FOR CONGRESSIONAL DISTRICTS OF THE 103RD CONGRESS, NORTH CAROLINA TABLES 1 AND 13.

Defendant-Intervenors' Exhibit 501

**"AFTER 120 YEARS:
REDISTRICTING AND RACIAL DISCRIMINATION
IN NORTH CAROLINA"**

A Report Prepared for *Shaw* v. *Hunt*
by J. Morgan Kousser
March 22, 1994

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IV. HOW WELL DO WHITES REPRESENT BLACKS IN NORTH CAROLINA?

A. CONGRESSIONAL ROLL CALL BEHAVIOR

29. Although there may be some symbolic value to choosing a person of a particular gender, ethnic group, or occupation, and although elected officials put much of their time and effort into particularized constituency services, the principal purpose of electing a representative is to insure that one's views are represented. If there were no systematic relationship between race and policy stances within the electorate or among elected officials, then the racial composition of electoral districts would be of little practical importance and of no legal interest. If blacks and whites in an electorate took the same positions on policy issues, or if the voting patterns of black and white members of Congress were indistinguishable, or if members of Congress from districts with very different proportions of people of each race in the electorate voted similarly, then it would not matter, for racial concerns at least, where the district lines were drawn. What has been the case in North Carolina? Have white and black members of Congress voted in the same way? Have whites reflected black interests so well that blacks do not need black faces to represent them, as Carol Swain has suggested is sometimes true in the nation as a whole? [footnote omitted] Is the black electorate, as such conservative pundits as Clint Bolick

suggest, much less liberal than the black elite, in which case differences between the voting records of black and white members of Congress would prove that black interests would be better represented by white faces? [footnote omitted]

30. The most easily accessible and comprehensive index of ideological patterns of behavior in congressional roll calls is *Congressional Quarterly*'s "Conservative Coalition Scores," which are based on 60-100 roll calls per session on a wide range of subjects and are published annually. The scale varies from 0 to 100, with 100 being the most conservative, as *CQ* determines it. [footnote omitted] Figure 1, which summarizes 23 years of data succinctly, demonstrates that black and white members of Congress from North Carolina do *not* vote similarly.

31. The members of Congress from the state have been grouped into three categories and the scores for each category have been averaged: [footnote omitted] Republicans, Democrats from the two most heavily black districts (the First and Second until 1993, then the First and Twelfth), and Democrats from other districts. The pattern is striking. Republicans consistently score about 90% conservative. Other Democrats average around 70%, but vary from the low 60s to the low 80s in particular years. The two white Democrats from districts One and Two act like Republicans until 1980, and then somewhat more like other Democrats. The huge anomaly in the figure comes when two black Democrats, Eva Clayton and Mel Watt, repiace whites in the two "black districts" after the 1992 election. Suddenly, a conservative index that had been nearly 90% in 1991 and 60% in 1992 becomes 11%. In North Carolina, the color of the member of Congress seems to make a major difference in roll call voting.

32. But was this just an effect of a new Democratic administration and two first-term members of Congress? Figure 2 suggests a negative answer to the question. It

juxtaposes the data for the North Carolina "black districts" from Figure 1 with scores for all African Americans elected to Congress from the eleven ex-Confederate states for every session since 1970 in which any were elected from that group. The fact that the 1993 figure for the North Carolinians is very similar to that for other southern black members of Congress implies that if districts in which African Americans had an opportunity to elect candidates of their choice had been drawn earlier in North Carolina, those people elected would have voted very differently from other representatives from North Carolina. On this evidence, then, the opinions of North Carolina blacks were not truly represented in Congress before the redistricting of 1992. To repeal that redistricting is to exclude those voices.

* * * *

36. A 1993 survey on racial attitudes in North Carolina sponsored by the Z. Smith Reynolds Foundation, Inc. of Winston-Salem suggests that citizens of the state mirror national trends. In Table 1, I have excerpted a few of the answers to the large number of questions asked of the respondents, divided them into four categories, and listed the percentages of each race holding the indicated attitudes. Panel A shows that whites and blacks differ in their beliefs about the extent of prejudice and racial discrimination in North Carolina today. One in five blacks, but only one in twenty whites considers race relations or discrimination one of the most important problems facing the state. More than twice as many blacks as whites considers racial discrimination in the state very serious and increasing. Nearly twice as high a percentage of blacks as whites agree very strongly that most whites in the state are prejudiced, and nearly three times as many think most whites "want to keep blacks down."

37. Panels B and C demonstrate even wider racial differences concerning the degree of private and public

discrimination in contemporary North Carolina. African-Americans are three to four times as likely as whites to believe that there is anti-black discrimination in jobs, housing, education, public accommodations, scholarships, local government, and law enforcement. Whites are more likely than blacks to perceive anti-*white* discrimination in jobs and scholarships by nearly a seven to one margin, and to think that the federal and state governments have done "too much to help blacks achieve equality" by thirty to one. Five times as high a proportion of blacks than whites consider "equal justice for minorities in North Carolina" a major problem. Panel D shows that members of the two races differ markedly on important governmental policies: banning housing discrimination, affirmative action in college admissions or employment, and busing schoolchildren for integration. In sum, in North Carolina, as in the nation as a whole, whites and blacks see entirely different worlds. In the white view, there is little remaining prejudice or public or private discrimination, and there is consequently little need for government programs to do something about it. In the black view, prejudice and discrimination are pervasive, and governments at all levels should act to remedy this serious plight. It is not a large inferential leap to connect constituents' attitudes revealed in these surveys with the congressional voting patterns portrayed in Figures 1 and 2.

* * * *

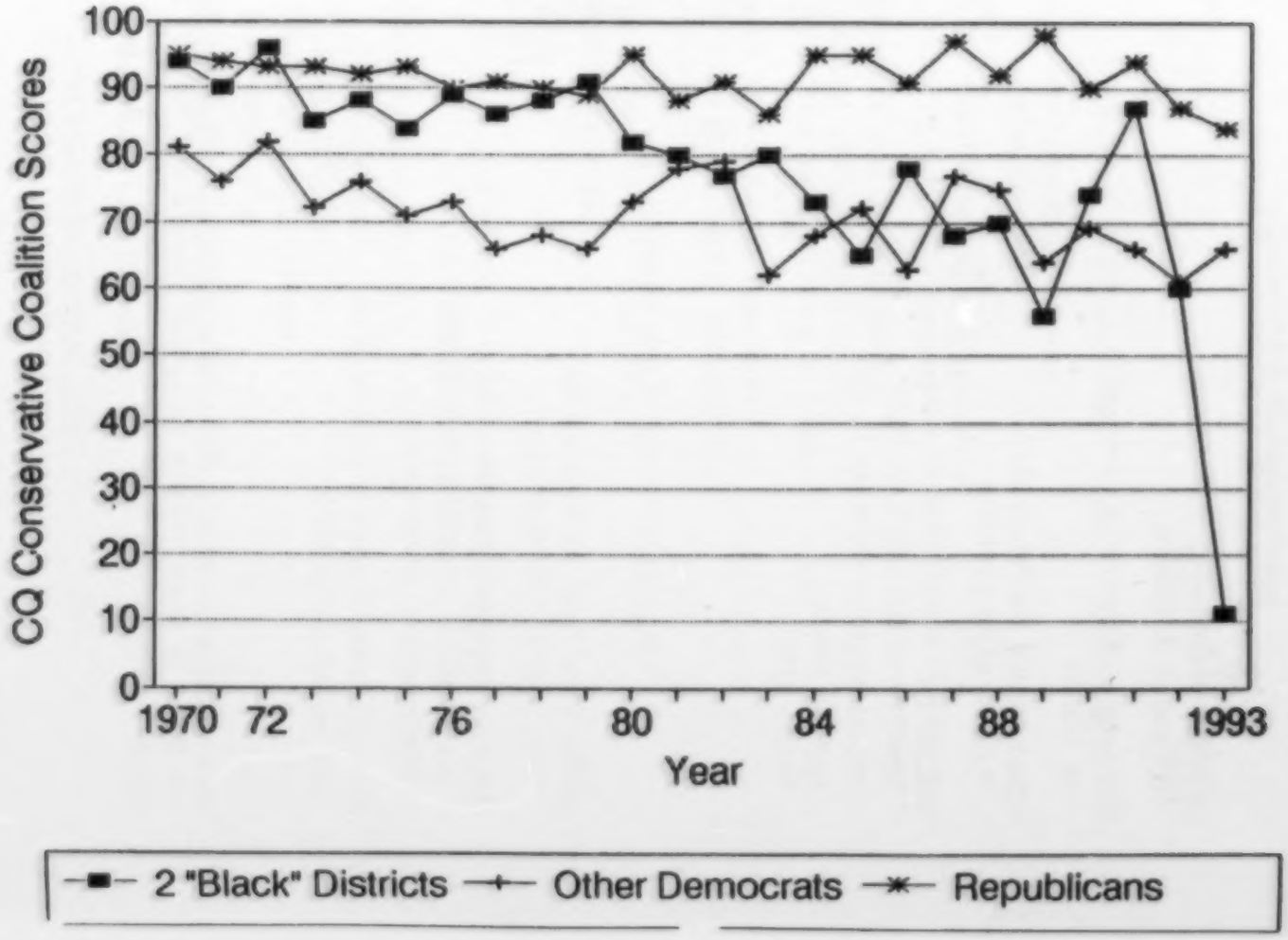
TABLE 1: DIFFERENCES IN RACIAL ATTITUDES IN NORTH CAROLINA, 1993

Item	Percent With Attitude	
	White	Black
PANEL A: GENERAL BELIEFS ABOUT PREJUDICE		
race relations/discrimination an important problem	5	20
racial discrimination and prejudice today in N.C. very serious	17	37
prejudice and discrimination against blacks in N.C. more prevalent in 1993 than in 1980	17	36
agree very strongly that most whites in N.C. have prejudiced views	38	70
most whites in N.C. want to keep blacks down	13	40
PANEL B: DEGREE OF PRIVATE DISCRIMINATION TODAY		
whites have better chance in N.C. to get		
any job qualified for	19	70
any housing can afford	13	54
good education	9	38
blacks often treated more slowly or less politely in N.C. restaurants or retail stores	8	45
qualified blacks are denied jobs, scholarships	20	74
qualified whites lose out on jobs, scholarships	40	6

PANEL C: GENERAL BIAS IN GOVERNMENT PROGRAMS		
local government in N.C. favors whites over blacks	13	52
law enforcement in N.C. tougher on blacks	19	64
equal justice for minorities in N.C. is major problem	15	65
federal and state governments have done too much to help blacks achieve equality in the		—
past 10 years	30	1
— too little	23	76
PANEL D: POLICY PREFERENCES		
prefer local housing ordinances that permit discrimination	44	15
strongly oppose giving blacks preferential treatment in college admissions or employment	52	24
strongly favor busing schoolchildren for racial integration	4	26

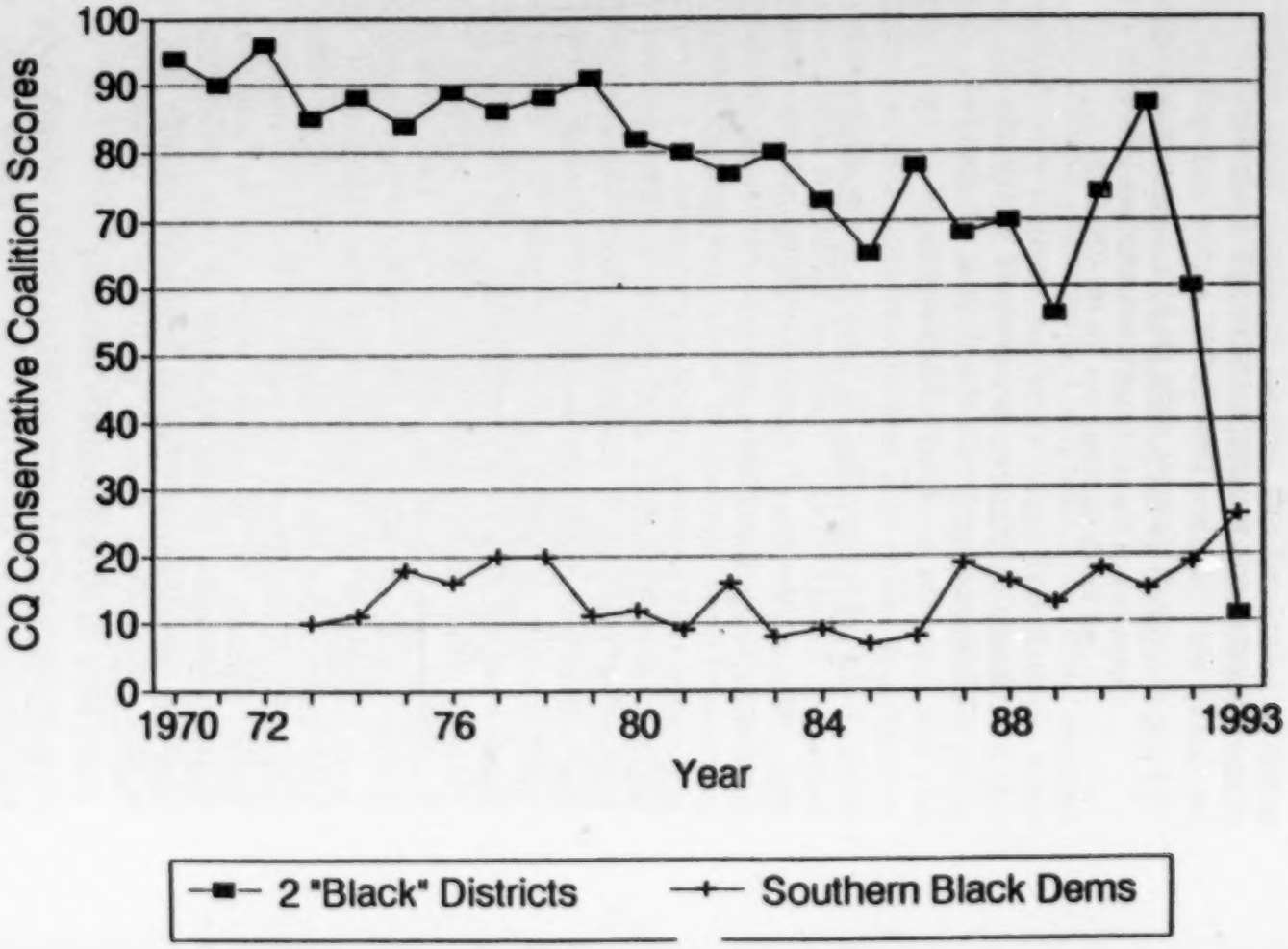
Source: September-October, 1993 telephone sample of 403 whites and 409 blacks in North Carolina by Howard, Merrell and Partners of Raleigh, sponsored by Z. Smith Reynolds Foundation.

Fig. 1: Do White and Black Congressmen Differ in North Carolina?



JA-608

Fig.2: N.C. "Black Districts" vs. Other Southern Black Members of Congress



JA-609

Defendant-Intervenors' Exhibit 501 (cont'd)

"RACE AND POLITICS IN NORTH CAROLINA, 1865-1994"

[A Report Prepared for the Defendant-Intervenors in Shaw v. Hunt United States District Court for the Eastern District of North Carolina, No: 92-202-CIV-5-BR]

Harry L. Watson, Department of History
University of North Carolina at Chapel Hill
March 23, 1994

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Fusion and White Supremacy, 1894-1901

[6] The dynamics of North Carolina politics changed dramatically in the 1890s. Adverse economic conditions persuaded large numbers of white, previously Democratic farmers that political action was needed to protect the state's poverty-stricken agricultural population, yet the leaders of the state's Democratic party refused to give this movement their full support. In response, a significant number of white voters deserted the Democratic party in favor of a new organization, the Populist Party. Though racial resentments still persisted between white Populists and black Republicans, the two groups [7] joined forces in the so-called "fusion" movement and won control of the legislature in the elections of 1894. The fusion dominated legislature then took steps to expand and safeguard the rights of blacks to register and vote, leading to increased black voting and further Republican gains in the election of 1896, including the election of Governor Daniel Lindsay Russell, the only Republican to be elected governor of North Carolina from 1872 to 1972. [footnote omitted]

Black political success had come from divisions in the white electorate along the lines of economic class, and leading white Democrats resolved that this development

should never be allowed again. In 1898, they launched a violently racist campaign against the Republicans, using highly influenced appeals to racial bigotry to persuade white Populist voters to abjure political ties based on economic interests and to vote Democratic in an expression of white racial solidarity.

The "White Supremacy Campaign" of 1898 featured extraordinary appeals to racial fears. The Raleigh *News and Observer*, the leading Democratic newspaper of the state, set the tone with a series of graphic cartoons on its front page. A repeated theme in these cartoons was the suggestion that Governor Russell and other Republicans, though white, were widely [8] influenced by black political leaders. [footnote omitted] Other images suggested that black political success would result in a loss of political patronage or employment for deserving white men. [footnote omitted]

Similar appeals to racial fear were repeated by white Democratic campaign spokesmen in speeches and written addresses to the voters. In a typical example, state Democratic party chairman Fannifold M. Simmons warned against "NEGRO CONGRESSMEN, NEGRO SOLICITORS, NEGRO REVENUE OFFICERS, NEGRO COLLECTORS OF CUSTOMS, NEGROES in charge of white institutions. NEGROES in charge of white schools, NEGROES holding inquests over the white dead . . . ." and declared that "North Carolina is a WHITE MAN'S state, and WHITE MEN will rule it, and they will crush the party of Negro domination beneath a majority so overwhelming that no other party will ever again dare to attempt to establish negro rule here." [footnote omitted] These tactics were effective, and Democrats won a sweeping victory in the legislative elections of 1898.

White passions were so influenced by the rhetoric with the 1898 campaign, moreover, that Democratic victory was followed by a coup d'etat and massive bloodletting in Wilmington, the state's largest city. On the day follow-

ing the election, a white male forced the Republican-dominated city council (which had not been [9] up for re-election) to resign and replace itself with Democratic successors. The mob then proceeded to attack black neighborhoods and murder black leaders, resulting in some fifteen to thirty deaths. These crimes were never punished. [footnote omitted]

On taking office in 1899, the Democratic legislators began to enact the program of enforced racial segregation recently endorsed by the *Plessy* decision of the United States Supreme Court (1896), by passing the state's first law requiring separation of the races on railroad trains. They also adopted a plan to strip black citizens of the right to vote, in order to make sure that political division in the white community could never again lead to a resurgence of black power. They adopted and submitted to the voters a constitutional amendment which imposed a literacy test and a poll tax requirement for the right to vote, with a "grandfather clause" to protect the voting rights of illiterate white men. The ensuing ratification campaign in 1900 was replete with familiar graphic images appealing to white fears of black domination. [footnote omitted] The literacy test was forcefully advocated as a subterfuge aimed at disfranchising black citizens in defiance of the Fourteenth and Fifteenth Amendments to the United States Constitution. As Locke Craig, future governor of North Carolina, put to campaign crowds, "It will unite into an irrevocable constitutional decree, that the white men of North [10] Carolina shall make and administer all the laws. This is the purpose and effect of the constitutional amendment." Moreover, claimed Craig, speaking of the literacy test, "this one section will wipe out the negro vote in North Carolina. Of the 120,000 negro voters it will disfranchise 110,000 of them, practically all of them. It will be good bye to all negro office holders, and all those who have their hope of office in the negro vote." [footnote omitted] A blunter message came from former

Congressman Alfred Moore Waddell, leader of the Wilmington "race riot" of 1898. "Go to the polls tomorrow," he said in a pre-election address, "and if you find the negro out voting, tell him to leave the polls and if he refuses, kill him, shoot him down in his tracks. [footnote omitted] Under these circumstances, the disfranchising amendment passed overwhelmingly. George W. White, the last southern black congressman before the passage of the Voting Rights Act, was swept from office and Charles B. Aycock, Democratic candidate for governor, won a decisive victory.

The Jim Crow Era, 1901-1950

In the aftermath of the disfranchising campaign of 1900, voting by black North Carolinians almost disappeared, as threats of violence and discriminatory enforcement of the literacy test [11] took a massive toll on black voter registration. [footnote omitted] Without a black electorate to stimulate white fears, white politicians found that inflammatory racial appeals had limited political usefulness and tended to abandon them. Without black supporters, the Republican party was reduced to a small fraction of white voters, mostly in mountain counties and Piedmont towns. Political power in the state was exercised almost entirely by white Democrats. As the North Carolina economy turned increasingly to business and industry, urban leaders found the cruelest forms of racial demagoging distasteful and bad for business, and state leaders began to encourage a "moderate" program of racial harmony, based on a combination of uncompromising support for segregation, with a toleration for gradual and limited black progress and a rejection of the most violent forms of race-baiting which often prevailed in the Deep South states in the first half of the twentieth century.

This fragile facade began to crack in 1948, when the national Democratic party included a civil rights plank in its campaign platform, and Strom Thurmond of South

Carolina headed a "Dixiecrat" presidential candidacy in protest. In 1950, the facade disintegrated entirely, when Willis Smith defeated incumbent Frank Porter Graham in a Democratic primary campaign for nomination to the U.S. Senate.

Graham had been appointed to the Senate on the death of his predecessor and campaigned for election in his own right, [12] beginning with the 1950 primary. A personally popular but politically controversial liberal, Graham had been a prominent support [sic] of Franklin D. Roosevelt's New Deal policies and had given qualified support to the civil rights policies of the Truman Administration. In the runoff primary of June, 1950, supporters of runner-up Willis Smith distributed anonymous leaflets warning "White People Wake Up! . . . Frank Graham Favors Mingling of the Races." Rumors spread that Graham had appointed a black candidate to West Point and doctored photographs showed Smith dancing with a black woman. Jesse Helms, a young announcer for WRAL radio in Raleigh, was an active Smith supporter who played a leading role in the campaign and later served as the victorious Smith's legislative assistant. [footnote omitted]

From the Smith-Graham to the Voting Rights Act, 1950-1965

The successful use of race-baiting tactics in the Smith-Graham campaign demonstrated the vulnerability of some North Carolina white voters to racial appeals in an atmosphere of changing race relations and renewed struggle for black civil rights. After the *Brown* decision of 1954, white fears of desegregation intensified even further, and appeals to racial prejudice reemerged as a regular feature of North Carolina's politics. The "moderate" atmosphere of the preceding fifty years, moreover, had given North Carolina a small but significant [13] black electorate, concentrated in many of the Piedmont

cities now included in the 1991 Twelfth District, and numbering some 40,000 by 1940. [footnote omitted] A standard ploy of post-1950 elections was for competing white candidates to accuse each other of seeking the votes of these black citizens, or otherwise demonstrating an insufficient loyalty to the principle of racial segregation.

In 1954, for example, supporters of Alton Lehman distributed an endorsement of rival Ken Scott by black political leader J.H.R. Gleaves, in order to discredit Scott with white voters. Scott responded with accusations of fraud and a strong endorsement of segregated schools. [footnote omitted] The following year, North Carolina Senator Sam Ervin drafted a "Southern Manifesto" pledging resistance to the desegregation process ordered by the United States Supreme Court in the *Brown* decision. Three North Carolina representatives were among the few who refused to join 101 southern members of Congress in signing the manifesto. These representatives then became the target of many political attacks by "The Patriots of North Carolina," a segregationist group. All three indicated support for lawful opposition to integration, but two of the three were defeated for reelection in 1956. Luther Hodges, an avowed segregationist and the successful Democratic [14] candidate for governor in that year was also accused of insufficient support for segregation in that election. [footnote omitted]

Similar tactics persisted into the next decade. In 1960 Dr. I. Beverly Lake ran a strongly segregationist campaign for governor. Opponent Terry Sanford replied to Lake's attacks by describing Lake as an extremist who would provoke federal intervention and bring about the very integration both men opposed. Sanford was likewise the target of anonymous leaflets charging him with being soft in the race issue. [footnote omitted]

The gubernatorial contest of 1964 featured similar exchanges. Dr. Lake again made a strong defense of

segregation, forcing his rivals Dan Moore and Richardson Preyer to advertise their opposition to the civil rights legislation then before Congress. After losing in the first primary, Lake threw his support to Moore, proceeded to charge Preyer with secret support for integration. The tactic succeeded, and Moore won the primary and the general election which followed. In the same year, presidential candidate Barry Goldwater likewise sought votes in [15] North Carolina by stressing his opposition to the Civil Rights Act of 1964. [footnote omitted]

From the Voting Rights Act to the Present, 1965-1994

The passage of the 1965 Voting Rights Act gradually changed the political climate of North Carolina. Under federal protection, the percentage of eligible black voters rose from 39.1 percent in 1960 to 50.9 percent in 1982. Forthright denials of blacks' legitimate rights of citizenship were abandoned by mainstream politicians, though subtle appeals to white racism persisted. Continuing a trend which had prevailed since the New Deal, most black voters adhered to the Democratic party, while whites who rejected changes in state race relations swelled the ranks of an insurgent Republican party. Strong two-party competition reemerged in North Carolina, leading to the Republican sweep of the presidential, senatorial, and gubernatorial elections in 1972. In this context, Democrats were not tempted to alienate their valuable black supporters by appealing to white racial prejudice. Republicans likewise eschewed an overtly racist image, unwilling to alienate "swing" voters who might be repelled by such tactics, though perhaps drawn to Republican programs for other reasons. Under these new [16] circumstances, political aspirants who sought to tap hidden veins of white resentment at black progress resorted to "coded" messages. Ambiguous words or phrases like "forced bussing" or "job quotas," which might have little racial content on the surface, appeared in political advertising in such a way as to convey to

certain audiences that the sponsoring candidate would be less sympathetic to black aspirations than his opponent. The use of these more subtle racial appeals maintained a climate in North Carolina politics which continued to hamper black voters in the equal exercise of their constitutional rights.

The changes did not come instantly. In 1966, for example, Republican challenger Jim Gardner toppled veteran Fourth District Democratic congressman Harold Cooley with charges that Cooley had bowed to federal pressures for desegregation. Gardner was aided by the distribution of racist leaflets on his behalf by leaders of the Ku Klux Klan. Cooley had faced similar charges in 1956, with more success. Republican challenger John East made similar charges against Democratic representative Walter Jones in the First District. Portions of both these districts now lie within the 1991 First District of North Carolina. The election took place against a backdrop of violent intimidation against black families who proposed to register their children in formerly all-white schools. [footnote omitted]

[17] Newer forms of racial coding appeared in the 1968 and 1972 presidential candidacies of George Wallace and the 1972 senatorial campaign of Jesse Helms. By this time, white concern over racial mixing in public schools had shifted from the simple presence of some black children in predominately white schools to the prospect of court-ordered bussing for racial balance. Wallace's advertisements appealed directly to this fear and linked it to more overtly racial issues by calls "to repeal the so-called 'Open Harmony' law." [footnote omitted] Similar associations attached to the 1972 Helms campaign. Helms was a prominent television commentator who had a well-established reputation as an opponent of the civil rights movement of the 1960s. In 1972, in his first senatorial campaign, Helms emphasized this established reputation by the slogans "you know where he stands"

and "He's one of us" and linked it to contemporary concerns by his opposition to "forced bussing." Endorsement by the Grand Dragon of the North Carolina Ku Klux Klan undoubtedly served to cement the association of Helms with opposition to changes in race relations in the minds of black and white voters alike. The use of racial code words in Helms campaign materials drew press commentary when it appeared in his successful 1972 Senate bid and has continued to do so in the senator's subsequent campaigns. [footnote omitted]

[18] A striking series of coded messages likewise appeared in small town North Carolina newspapers in the spring of 1983, when Jesse Helms was preparing for an expected challenge by Governor James B. Hunt. "What North Carolina Newspapers Say About Voter Registration" featured a picture of Jim Hunt sitting beside the Rev. Jesse Jackson, at a camera angle which showed Jackson to be much larger and thus dominant over Hunt. Accompanying quotations warned of the prospect of increasing black voter registration and asked "Is This a Proper Use of Taxpayer Funds?" Without directly saying so, this ad suggested that Governor Hunt was dominated by Jesse Jackson and black voters. As political journalist Joe Doster remarked at the time, "the primary motive is simply to make the association between Hunt and blacks and to raise fears among whites that Hunt is a captive of black voters." [footnote omitted] Structurally, the ad has a close resemblance to comparable images from the 1898 "White Supremacy" campaign, especially such cartoons as "The Source of the Governor's Inspiration" (*News and Observer*, September 30, 1898) and "The New Slavery" (*News and Observer*, October 15, 1989). Subsequent ads in the same series repeated the alleged ties between Governor Hunt, black political leaders, Jesse Jackson, Julian Bond, and Harold Washington while another display featured a picture of striking black school [19] teachers and linked Hunt policies to "the calling of strikes" and general disruption of the education of our children." [footnote omitted]

Unfortunately, Governor Hunt himself was not the only victim of this kind of campaigning. The 1983 Helms ads clearly appealed to white fears of black voters and black elected officials, and thus undermined the efforts of black citizens to exercise their political rights by encouraging the belief that political activities by black[s] can only be threatening to whites.

Themes addressed in the 1983 Helms ads remained current in North Carolina politics through the early 1990s. Perhaps the most famous example occurred in Senator Helms' 1990 reelection bid against Democrat Harvey Gantt. Polls showed that Gantt, a black man, had been leading until the final week of the campaign, when a television ad began to run which showed a white man's hands crumpling a job rejection notice. The voice of an announcer declared, "you needed that job, and you were the best qualified, but it had to go to a minority because of a racial quota of the sort enshrined in Ted Kennedy's quota bill." This advertisement has been widely recognized by academic and journalistic experts to have had a powerful impact on the election, galvanizing Helms' core constituency, increasing voter turnout, and building an unassailable majority for the incumbent. Its status as an appeal to racial fears and resentments has also [20] been widely recognized, as it tapped into prominent themes in Helms' political image dating back to the Smith-Graham campaign of 1950. [footnote omitted]

It is important to realize, however, that the "white hands" ad was not an isolated example of racial appeal in an otherwise color-blind political process. Numerous political messages of the early 1990s in North Carolina sought to undermine opponents by associating them with unpopular black politicians. In August, 1990, Senator Helms had issued a fund-raising letter to supporters which mentioned Harvey Gantt's name twice, but referred six times to Ron Brown, identified as "National

Democrat Chairman" and "a former assistant to Senator Ted Kennedy." Other Helms campaign material featured Brown's picture without mentioning Gantt at all, or featured pictures of Gantt's black campaign manager, pointedly reminding viewers of Gantt's base of support in the black community. [footnote omitted]

[21] Similar approaches have appeared in the campaigns of other recent North Carolina candidates. A particularly blatant example appeared in rural Columbus County, parts of which now lie in the First District. An anonymous leaflet warned local voters in 1990 against "*The Negro Vote*, which is delivered by such political organizations as the local *NAACP* Chapter, headquartered in Whiteville and Club 15 in Tabor City," and predicted that "more *Negroes* will vote in this election than ever before." [footnote omitted] In a statewide setting, the first television advertisements for D.M. "Lauch" Faircloth, successful Republican candidate for the U.S. Senate in 1992, began with denunciations of "Ted Kennedy's civil rights quota bill." Television advertising in Jim Gardner's 1992 campaign for governor against Jim Hunt included "a TV commercial reminiscent of the 1988 presidential campaign's Willie Horton ads, featuring long lines of trudging black convicts," intended to suggest that Hunt was soft on criminals. [footnote omitted] Republican ads in the 1992 presidential election warned that "If Bill Clinton is elected President, Jesse Jackson will be a U. S. Senator." [footnote omitted] At least two campaigns in 1992, one local race is a part of the Twelfth Congressional District, and one statewide race, featured [22] "parallel photo" ads which called voters' attention to the fact that a black candidate was running against a white. In the local race, for district court judge in Forsyth County, the ad for Toni Reemer, a white woman, reminded voters concerned with issues of race and crime that she was endorsed by law enforcement officials, while linking her black opponent, Loretta Briggs, to locally prominent black civil rights advocates. [footnote omitted]

CONGRESSIONAL REDISTRICTING AND THE POLITICAL PROSPECTS OF BLACK CANDIDATES FOR CONGRESS

The cumulative effect of this historic and continuing resort to racial appeals in North Carolina politics has been to diminish seriously the opportunities of black citizens for an equal exercise of their political rights. The history of Congressional redistricting in North Carolina and the experience of black candidates for Congress demonstrates this point clearly.

North Carolina has undergone Congressional redistricting four times since the passage of the Voting Rights Act of 1965; in 1965-66, in 1971, in 1981-82, and in 1991. This has been a race-conscious process at all times, but legislators took special pains in 1965-66 and 1981-82 to dilute black voting strength in order to diminish the political leverage of black voters and the political prospects of potential black candidates.

[23] A perennial "problem" has been the disposition of the large and politically well-organized black community of Durham County. A proposal in December of 1965 to create a Research Triangle District composed of Durham, Wake and Orange Counties produced what reporter David Cooper of the *Winston-Salem Journal* called "a private howl from conservatives in Wake." The Raleigh Chamber of Commerce passed resolutions against the plan. During executive session, Wake County Senator Jyles Coggins reportedly warned his colleagues that it "would create a district with a heavy concentration of colleges, white and Negro." When asked to explain this remark before the redistricting committee, Coggins was quoted at one point in debate as saying "let's don't put all our eggheads in one basket," and other testimony before the committee reportedly warned against the political effect of "Negro block votes" in Durham County. [footnote omitted] Reporter David Cooper of the *Winston-Salem Journal* agreed that "beneath the

surface the argugment [sic] was that the presence of so many colleges and Negroes in the triangle might create a district that would elect a liberal congressman," or in this context, a congressman responsive to black political interests. [footnote omitted]

After much debate, the committee finally settled on a gerrymander that put Durham County in the Fifth District with [24] distant Forsyth County, location of the city of Winston-Salem. Durham County Senator Claude Currie explained the reasons succinctly. "Nobody wants Durham. They don't like our Negro situation. They nailed down everything else and then tacked us on." Currie added "there's going to be a lawsuit about this," but the threatened court action never materialized. [footnote omitted]

This racially-gerrymandered "Second District" of 1966 became the political home of Congressman L. H. Fountain, a conservative white democrat. Fountain's district, which included large portions of the 1991 First District, had a large black population, but Fountain opposed the contemporary civil rights movement and was widely perceived as unresponsive to the political goals of black citizens. Early in the 1981 redistricting process, newspapers reported the opposition of Fountain allies to the inclusion of Durham County in a redrawn Second District. In the words of A. L. May, of the Raleigh *News and Observer*, "The likely political impact would be to assure Fountain of tough Democratic primary opposition from Durham Democrats, including black candidates." A race-conscious struggle to keep Durham out of the Second District, thereby preventing the election of a congressman more responsive to black [25] interest than Mr. Fountain, became the centerpiece of a prolonged redistricting controversy in 1981. [footnote omitted]

Fountain's supporters were initially successful in keeping Durham County blacks out of his district and created a long, narrow, rural district that many observ-

ers compared to a fishhook. "This would stretch the 2nd halfway across the state," protested Rep. Kenneth B. Spaulding, "a black legislator from Durham County, but the legislative majority did not reject its "bizarre" shape or label a case of "political apartheid." [footnote omitted]

North Carolina's redistricting plan was denied preclearance by the U.S. Justice Department on December 8, 1981, on the grounds that it violated the terms of the Voting Rights Act.

The redistricting struggle began again, with observers in agreement that "the location of Durham County - and its politically potent black community - is the key to the congressional redistricting fight." [footnote omitted] Durham County was included in the Second District, however, and Representative Fountain announced his retirement from politics when black candidate H. M. "Mickey" Michaux announced his intention to seek the seat.

[26] Subsequent events proved, however, that substantial barriers remained to black electoral success in North Carolina congressional elections. The new Second District had a forty percent black population, but Michaux was opposed by white democrat, Tim Valentine. Though Michaux led voting in the first primary, Valentine triumphed in the second, after running ads which touched on well-worn racial themes, warning against "the same ***well organized block [sic] vote*** and predicting that "my opponent will again be ***bussing his supporters*** to the polling places in record numbers." [footnote omitted] Aided by such tactics, Valentine won the second primary by 56 percent and went on to victory in the general election.

Similar racial appeals have planed an important role in Congressional elections of the 1990's. Representative J. Alex McMillan, of the 9th District, used a 1990 fund-

raising letter to fan worries "the potential danger of a sophisticated get-out-the-vote effort among the core Gantt constituency - a constituency that particularly exists in substantial numbers in the most populous part of my district, Mecklenburg County." [footnote omitted] As candidates for the U.S. House and U.S. Senate, of course, McMillan and Gantt were not running against each other, but the letters' "thinly veiled racial overtones" were part of a continuing tradition in Tar Hell [sic] politics.

* * * *

Defendant-Intervenors' Exhibit 502

STATEMENT OF JOSE F. ALVAREZ

I, Jose F. Alvarez, under penalty of perjury, state as follows:

1. I am a resident of Greensboro, North Carolina. Currently, I am the political director of the Amalgamated Clothing & Textile Workers Union (ACTWU). In that capacity I am responsible for organizing the union's political activities. This includes the Union's activities in political education, voter registration, fundraising, campaigns about particular issues, and organizing the union efforts in various elections.

2. I am familiar with the demography and character of District 12, and the ACTWU locals in North Carolina, because prior to assuming my present position I was in charge of the Central North Carolina District of the union. This ACTWU district covers most of our plants in North Carolina, except for two concentrations in Eden and Roanoke Rapids, North Carolina. This Central North Carolina ACTWU district is basically the Piedmont corridor. The I-85 corridor is where I spent 4 years in the ACTWU district. I spent four years in which I mainly drove up and down that corridor representing workers in the 12th district.

3. The Amalgamated Clothing & Textile Workers Union represents approximately 11,000 workers in North Carolina. There are 17 locals in the ACTWU Central North Carolina District, 12 of these locals are in the 12th District. There are two concentrations of ACTWU locals in North Carolina, and these are mainly found in the 1st and 5th Congressional Districts.

4. What distinguishes the 12th District is the obvious row of urban centers in Charlotte, Greensboro and Durham that it encompasses. It is really the only urban district in North Carolina. It also includes the industrial

towns of the Piedmont. The district incorporates not just the places where the plants are located, but also the communities in which the employees reside.

5. When the district got formed and we began to look at the configuration, we began calling it the North Carolina Textile Congressional District. While I support the goal of creating the first black district since reconstruction, and the election of the first black congressman since reconstruction, I was also excited that this was the first textile district. Whenever I introduce Mel Watt at functions, or when I reported to our members the final conclusion of the redistricting process in North Carolina, I would excitedly report to them that not only had North Carolina gained fair representation for blacks in the state, but that now there is fair representation for textile workers in North Carolina as well.

6. The North Carolina Textile Belt, is made of small towns, like Hillsboro, Burlington, Haw River, Graham, High Point, Thomasville, Salisbury, Cornelius and Gastonia[.] This is where the plants are. Historically, the industry was organized around mill towns. The textile companies would set up the towns, and the people lived and worked in the towns. Not only are the textile plants located in these towns, but the furniture plants are also located in these towns and the workers live there too. A lot of the small farmers in these towns are actually textile workers as well. They have small pieces of land and they can't live off farming any more, so they work in the mills.

7. District 12 is a two and one-half (2 1/2) hours drive from one end of the district to the other. Greensboro is in the middle of it. In my new position as National Political Director, I have learned that with respect to other congressional districts, it is among the easiest and most simple to organize and get around in. After the district lines finally were drawn, during the primary season it was nothing for us to get people together on a Saturday

morning to talk about candidate positions and issues. It was a joy to get people together, all of whom lived in the 12th District, who previously lived in as many as six congressional districts. After the 12th was created, and I began talking about it as North Carolina's new textile district, we were able to regularly organize people for issues discussions and for meetings with the candidates. I'm talking about people being able to leave their houses in the morning for a meeting and be back at home for lunch.

8. In the 1980s I worked in Georgia in a congressional district that was majority white. It was super long, and wound through all of rural Georgia where there were no interstates. At different times we tried to bring together groups of people from the district with common interests and it was virtually impossible. The roads made it impossible to get together and there were no real communities of interest. That is not a problem in the 12th District here in North Carolina.

9. For us, the primary concerns are jobs, jobs, jobs. Our industry is based on lower wage-type jobs, we do have some high tech plants, however even in those plants we are facing threats from the globalization process. Many companies are rechanneling their investments towards other countries in Latin America and the Caribbean. Companies that are not able to do that are being threatened by competition from these countries that have lower labor standards, wage standards, and environmental standards.

10. Questions of education and training are also critical in all of the towns in the North Carolina Textile Belt. We are talking about both retraining of workers and preparation for kids. What kinds of jobs are they being prepared for? How are all workers being prepared for the new economy? Retraining suggests that there are jobs waiting, however, we have problems because even when

there is retraining, there is not necessarily a job waiting at the other end of it.

11. One of my main interests is in getting regular working people involved in the political process. I have found that working people in the mill towns of North Carolina are often particularly disengaged in the political process. I am comparing the mood here in North Carolina to what I saw in Georgia and Alabama. There are mill towns in North Carolina where I would be surprised to find a 5% voter registration rate. Part of this low participation rate is a vestige of mill village mentality - a general sense that it is not your role to have a say in politics. What is so exciting about the 12th District with its commonalities of interest - for example, every candidate who ran for Congress had to speak to our issues - is that it has facilitated the political involvement of people in these small towns. The fact is that now, people who run for office in District 12, have to address these concerns in a way that the Congresspersons who ran in the several different districts that used to cover this area, never did before.

12. District 12 is a significant improvement over the situation in 1980. Then even a small town like at Salisbury was divided into several districts. While towns may still be divided in the 1990 plan, to some extent, the concentration of the locals is in the 12th. One plant I have in Greensboro has 2000 workers. They are represented by 3 different congressmen, but 75%-80% are represented by whoever represents the 12th District. One big concentration of workers that are not in the 12th are excluded not because the city of Greensboro is split, but because they live in a different city altogether. Many of these workers have come to work in the 12th after a plant closed up where they lived. Part of Greensboro is in the 6th and part is in the 12th, but our people who are in the textile mills are all in the 12th—the 12th covers the textile workers.

13. No white members of ACTWU have expressed any concern about being in a majority black district. There tends not to be overt conflict among the races in our plants. Our white members have been actively involved in the congressional campaigns. We have some members who registered for the first time in their lives to vote in the 12th District Congressional campaign.

14. There are a variety of issues that concern our members and we feel we have been successful in communicating these concerns to Congressman Watt. For example, health and safety reform (sparked by Imperial chicken plant fire) has been a major concern. Congressman Watt of the 12th District has been a very outspoken advocate for health and safety reform. Unemployment benefits extension, the economic stimulus package, job creation, these are also issues of great concern to our members, black and white, and again we have found Congressman Watt of the 12th District to be very responsive on this. Finally, his vote against NAFTA, and particular [sic] his concern that it did not deal with retraining, was representative of the views of our membership.

15. One of ACTWU's major concerns is with political participation by a constituency that has not found a way into the political process. We think District 12, and measures such as motor voter, which was also supported by Congressman Watt, will be helpful in stimulating this kind of political participation.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

This 23 day of March, 1994.

/s/ Jose F.
/s/ Alvarez
Jose F. Alvarez

Defendant-Intervenors' Exhibit 502 (cont'd)

STATEMENT OF DR. ROBERT ALBRIGHT

I, Robert Albright, under penalty of perjury, state as follows:

1. For 13 years, beginning in 1981, I was a resident of North Carolina. From 1981-1983, I served as Vice Chancellor for Student Affairs at the University of North Carolina at Charlotte and from 1983-1944, I served as President of Johnson C. Smith University in Charlotte, North Carolina. I am currently employed as Executive Vice President for Programs, Research, Development and Field Services for the Educational Testing Service (ETS), in Princeton, New Jersey. A copy of my Curriculum Vitae is attached as Exhibit 1 to this Statement.

2. Founded in 1867 by the Presbyterian Church, Johnson C. Smith is a private historically black collage. The university is a coeducational undergraduate institution, enrolling approximately 1,400 students, almost evenly divided between men and women. Approximately 1,100 of the 1,400 students live on the campus of the University. It is situated on a 110 acre campus located approximately 2 miles from downtown Charlotte. The university is a member of the United Negro College Fund, and several other educational associations.

3. Johnson C. Smith is one of six historically black colleges which are located in the Twelfth Congressional District. These include Bennett College, Livingstone College, North Carolina Central University, North Carolina A & T and Winston-Salem State University. The locations of these institutions are shown on the map attached as Exhibit 2 to this statement. Most of these institutions are located in urban areas. In fact, for the most part, they are located in the heart of the urban areas, and more specifically in communities one would describe as historically black communities. These institutions play

a particular role by attempting to address the pressing urban problems faced by the communities in which they are located.

4. For example, Johnson C. Smith is extremely involved in addressing the kinds of problems that arise in an urban center like Charlotte. The university is located on the west side of Charlotte, in a predominantly minority community, and it is actively involved in serving as literally the intellectual and cultural hub of the black community of Charlotte. Over the past ten years the university has been very actively involved in attacking and addressing some of the urban problems which affect not only minority people, but other individuals in the Twelfth District and on the west side of Charlotte. We have, for example, launched a series of pre-college enrichment programs, to help improve the educational opportunities for minority youngsters, from the earliest grades through high school. Like the other historically black colleges in the district, we sponsor federally supported Upward Bound programs to help prepare high school students for college. Like several of the other historically black colleges in the district, we sponsor the National Youth Sports Program, a large-scale program supported by the NCAA, to give junior high school students a safe environment in which to play and learn during the summer. Johnson C. Smith University, like an increasing number of the other historically black colleges in the Piedmont, is also broadly and deeply involved in community development. Along with 12 neighborhood associations in our community, we began *Project Catalyst*, which is designed to revitalize these communities and to provide economic development and affordable housing opportunities, to coordinate human services needs and to improve the overall image of the west side corridor. The needs addressed by our project are common to the communities surrounding all the historically black colleges in the Piedmont.

5. The historically black colleges share a number of similar interests because we are all deeply committed to serving our respective communities. We also need special assistance in trying to leverage additional support (particularly federal support) to help us with our educational and community support programs. We are similarly situated in terms of serving in a very broad way the immense and diverse needs of the communities in which we are represented and, again, in serving as the cultural, social and political hubs of our communities. On a federal level, issues which are of importance to historically black colleges include student financial aid, federal funding for elementary, secondary, and post secondary education, education reform, accreditation, community economic development, grants and loans for housing and small business, and issues of importance to minorities generally.

6. There is, in my view, an advantage to having most of the historically black colleges in the state in one congressional district. To the extent that we have a collection of such colleges with one congressman, it allows that congressman to serve us far more effectively than we have ever been served before. Instead of responding to an individual initiative from one school, the congressman can hear a unified voice. Congressman Watt, for example, has had several meetings in which all of the institutions in his district have come together to talk about mutual interests, to form plans, and to establish a consortia of efforts to develop programs which more broadly represent a great collection of minority citizens in the state of North Carolina. Congressman Watt has reminded us of the many ways in which the interests of historically black colleges and those of minorities are the same. He has exhorted the historically black colleges to work harder and take even more of a leadership role serving those common interests. Because of Congressman Watt's focus on the historically black colleges in the district, the institutions have begun to

think collectively in a way they have never done before. While the institutions had previously shared needs, interests, and culture, our being joined by common congressional representation has greatly enhanced our joint efforts.

7. We did not find much resonance with our prior representative, Congressman McMillan, to support the efforts for which we were seeking federal support. Our relationship was not adversarial; in fact, he serves on the Johnson C. Smith University Board of Visitors. Congressman McMillan has always been cordial and friendly with us but he has not addressed the needs of our institutions in a way that we felt those needs should be addressed. We have frequently written to Congressman McMillan, and he has responded with nice letters which were polite, but we never felt he understood the unique nature of historically black colleges. He did not understand or fully support the issues which we were concerned relating to the social problems in our university's primarily low-income neighborhood. Part of the mission of Johnson C. Smith University and the other historically black colleges is to improve the quality of our neighborhoods, establish community development corporations, and partnerships between schools. Johnson C. Smith's pleas to Congressman McMillan concerned these issues, as well as the educational and funding issues.

8. In contrast, we have worked closely with Congressman Watt on a variety of issues ranging from the concern about student financial aid for impoverished students, to mechanisms to generate more support and to provide educational opportunities for our students. We have discussed broader educational issues, including accreditation, desegregation, and the President's new community service program. We have discussed how we as institutions might play a large role in the necessary reform of elementary and secondary education and prepare better students. Congressman Watt has taken

the initiative on a number of these issues. He supported the President's Community Service program, which is important to us because it brings together issues of opportunities for our students and support for inner-city communities in which our institutions are located. Congressman Watt also supported and forcefully advocated for the President's Initiative on Historically Black Colleges. This initiative requires all federal agencies to set aside funds for historically black colleges and instructs the Secretary of Education to oversee those programs so that the funds will actually be distributed. The President's Initiative will result in more federal dollars for historically black colleges than ever before. Increased support for historically black colleges benefits all citizens, not simply minorities, by improving educational opportunities for black students who will become leaders in both the minority community and the community at large.

9. Congressman Watt has also been active in getting the historically black colleges in the Twelfth Congressional District more involved in health care issues. This is an area in which the neighborhoods surrounding the colleges look to those institutions for leadership. Health care issues are important to all citizens in the Twelfth Congressional District, but the low-income and minority residents of the district also share specialized needs and concerns with respect to health care. Encouraging the historically black colleges to take a leadership role in health care reform ensures a wide-ranging debate and consideration of the unique concerns of our communities.

10. Congressman Watt has made a special effort to keep historically black colleges informed of important developments and issues before Congress. We have been receiving mailings from the Congressman's office on a weekly basis, informing of us of bills before Congress and their implications for historically black colleges. One

mailing advised us of a student internship program and not only encouraged us to nominate some of our students for the internships, but also asked us to send the Congressman a copy of our nominations so that his staff could track the nominations. We never had any contact from Congressman McMillan's office except in response to our specific inquiries.

11. I think the Twelfth Congressional District is critical for several reasons. First, it strikes me that given the peculiar demography of North Carolina, it is highly unlikely that we would have a black Congressman but for the presence of something like the Twelfth District. Moreover, I think a very important aspect of having a black congressman is that it provides a sense of hope and inspiration for our youth. The presence of Mel Watt demonstrates that aspiring to become a congressman is not outside the boundaries of a young person who has an interest in politics.

12. Secondly, I believe there is some value in having one congressman who understand[s] urban issues and urban problems and is willing to and able to affect those issues and problems across the state which concern minority citizens and their communities. Representing many communities, rather than one community, allows that person, I think, to have more leverage in the halls of government, because generally it is very difficult for an institution, or even to some degree a city, to get new money for projects designed to serve minorities and the disadvantaged. Therefore Mel Watt has a distinct advantage when he goes to speak to people in the various departments (all of which have special initiatives set aside to address these problems). He can really represent a consortia of institutions rather than a single institution, and he can represent a consortia of cities or at least urban neighborhoods and communities, rather than a single community. 13. I believe there is a distinct advantage in having one congressman serving the

Twelfth District. Even though it is a long district and consumes a lot of Congressman Watt's time and energy, he has been remarkably successful in visiting each of the communities he serves. However, even more important, he has been remarkably effective, I believe, in calling the communities together and, in fact, compelling us to think about problems on a much broader scale than our own individual interests. In essence, his style and approach has compelled us to work together to address community and educational problems that are more macro in scope than micro — and to that extent I believe that the communities we serve will benefit immeasurably from that process.

Defendant-Intervenors' Exhibit 502 (cont'd)

STATEMENT OF DENNIS RASH

I, DENNIS RASH, under penalty of perjury, state as follows:

1. I am a resident of Charlotte, North Carolina. Originally from Lenoir, I have lived in North Carolina all of my life, except during the time I attended the University of Virginia Law School. I live and work in the 12th Congressional District.

2. I am President of NationsBank Community Development Corporation. I have held this position since December of 1991 when NationsBank Community Development Corporation was formed as a wholly owned, public interest subsidiary of NationsBank following the merger of NCNB and C & S Sovereign Bank. From May 1978 until December 1991 I was President of NCNB Community Development Corporation, a not-for-profit subsidiary of NCNB National Bank of North Carolina. Prior to that I had been Dean of Students at the University of North Carolina at Charlotte since 1970 and a member of the faculty of the College of Business Administration. Between September 1965 and November 1970 I was an attorney with the firm of Moore and Van Allen in Charlotte.

3. I have known Congressman Watt for almost 20 years and have worked with him periodically on community development matters. I first had occasion to work with Mel Watt when he became an original board member of NCNB Community Development Corporation in May, 1978. While in private practice, he represented NCNB Community Development Corporation in a number of real estate transactions.

4. My professional experience in the past fifteen years has been in the area of central city development and redevelopment. The goals of both NCNB and Nations-

Bank Community Development Corporations have been to develop a balanced program of central city revitalization, ranging from economic development and small business assistance projects to low- and moderate-income housing programs. From an initial capital base of $250,000 we have to date developed revitalization projects in excess of $125,000,000 in North Carolina. All of these have been in central city locations in North Carolina and the majority have been in state-designated urban renewal areas or redevelopment areas. We always work in active participation with local governments. We have developed projects in Charlotte, Greensboro, Fayetteville and Raleigh. The majority of our revitalization programs have involved primarily residential projects. However, in Charlotte and Raleigh we have been involved in developing mixed-use projects and some commercial central city redevelopment involving hotel, office and retail properties. In Raleigh we were involved in a revitalization project that developed a retail area.

5. Another significant aspect of our work is consulting with state and local officials about similar revitalization programs in their cities. We have provided consultation services to the cities of Winston-Salem, Durham, High Point, Asheville, and Gastonia. Our assistance and consultation has covered a broad range of projects, giving advice on topics such as funding mechanisms, both private and governmental; zoning issues, and overall strategies for revitalization with an emphasis on creative and effective involvement of the private sector.

6. I have served on a number of national committees, commissions and groups that address urban revitalization issues; including being a faculty member for five years in the Mayor's Institute for City Design, a program sponsored by the U.S. Conference of Mayors and the National Endowment for the Arts. I am a member of, and presenter to, the Center City Task Force of the Urban Land Institute. The Urban Land Institute is a national trade

association. The Center City Task Force was formed after the riots in South-central Los Angeles to develop strategies to deal with deteriorated housing conditions and sub-standard living conditions in American cities. For the past year and a half I have served on the Board of the National Alliance to End Homelessness. This is a national bi-partisan organization that provides policy recommendations to Congress and the Department of Housing and Urban Development. The bi-partisan nature of the organization is signalled by its co-chairs, Susan Baker, wife of former Secretary of State James Baker (a Republican), and Tony Harrington, former General Counsel to the National Democratic Party. In 1988 I was appointed by the North Carolina General Assembly to serve on the Commission on Jobs and Economic Growth which examined the impact of small businesses on the creation of employment opportunities. As part of my Commission work, I was Chairman of the Subcommittee on Natural Resources and Public Investment.

7. Through my participation in all these various groups, I have been able to draw on a fund of information about federal, state and local redevelopment programs and have explored in great detail how the private sector could collaborate with those various governmental agencies. I have been called on from time to time to talk about federal collaborations; and have given testimony before the House Banking Sub-Committee on Housing and Community Development.

8. From my experience, the intrinsic value of the 12th Congressional District is that it is North Carolina's first and only congressional district that is composed of the state's most rapidly growing urban areas. It has a general characteristic that is distinct from the rest of the congressional districts. It is a district that confronts head on the important issues for an urbanizing state. Most other districts in the state connect areas and populations that give rise to a combination of rural and city issues at the

federal level. The 12th District is uniquely urban in its dominant issues.

9. The multiplicity of issues facing our urban centers as the state becomes increasingly populated and urban are critical, complex, and require the undivided attention of a congressional representative. These issues include, in the housing area alone, the need for affordable housing, both for low and moderate income people; the need to rebuild deteriorated housing; the need for first-time and middle-market home ownership, and the need to continue to have housing patterns that characterize a multi-functional center city. The central city areas of the Piedmont region in North Carolina also share similar transportation issues and are increasingly recognizing the importance of exploring alternatives to private automobiles for daily commuting; North Carolina's cities face air and water quality problems that are not shared by rural areas. Likewise, the factors that impact economic development are distinct in the urban areas. All of the cities in the 12th District share the concern over these issues. In that regard the 12th District is very different from many congressional districts that combine urban and rural areas such that there is a smattering of the urban issues but also the need to recognize agricultural or other rural interests. From this perspective, the 12th Congressional District is intrinsic genius.

10. Urban areas, as they grow, find themselves polluting the environment to the point where it threatens the quality of life. The cities of the Piedmont face challenges characteristic of a compression of population, including dealing with a commuting pattern that predominates in the district. Charlotte, Greensboro, Winston-Salem and Durham experience an in-migration of employees every business day along I-85. These patterns relate to the affordability of housing in the central city compared to outlying areas. The commuting choice has

implications for the use of energy, involves infrastructure, air quality and other transportation-related costs. These are all issues addressed at the federal level. They are significant issues that a congressman who represents urban North Carolina should grapple with full time without also having to be an expert on the rural issues, such as tobacco subsidies, which would be required of a congressman representing a less homogenous district.

11. The economic health of all of the cities in the 12th District is heavily dependent on the financial institutions located there. Even though there may be some difference in emphasis among the types of businesses that are situated in the various cities, all need start-up equity; sound business planning and training services; and access to expansion capital, even if they are only modestly successful. These needs predominate in urban areas, and are not a major issue in the state's smaller towns, such as Lenoir, where I am from originally.

12. Having an urban 12th District has facilitated my ability to get information from my congressman's office about public housing programs and other federal programs of interest to me in my work. Successful community development efforts rely on cost-effective federal, state and local support combined with private sector investment. For example, recently the Department of Housing and Urban Development has agreed to help fund a 34.7 million dollar housing demonstration project with the Charlotte Housing Authority to create the conditions for self-sufficiency for public housing residents of Earle Village and First Ward in Charlotte. Nationsbank Community Development Corporation is the program manager of the funds, which will be used for renovation and rebuilding of the housing, as well as for providing a wide range of services to program participants including senior citizen care, child care assistance, and job training. All of these programs have the goal of residents eventually becoming able to pay their rent outright

without financial assistance, and to move out of public housing into affordable housing where they are self-sufficient on a long-term basis. This is a demonstration program which will provide a model for central city revitalization for urban communities throughout the country.

13. There are a growing number of non-profit neighborhood-based community development corporations in the inner city areas of the 12th Congressional District. These groups are one of the key elements in an effort to revitalize communities through a public-private partnership between government, lenders, and neighborhood residents. The neighborhood-based non-profits promote residents' development of skills and self-sufficiency. Federal assistance through grants and loans are critical to the success of these organizations. Having many of these organizations in one congressional district furthers effective representation of their needs.

14. In 1990 NCNB Community Development Corporation prepared a videotape intended to show all of our bank offices, from Texas to Florida to Maryland, why investing in communities is good business. During the filming of this videotape we interviewed a young man who was thirteen years old at the time and lived in a "starter home" we developed in an urban renewal area of Charlotte. We asked him what was different about his life today. His response was: "When I lived in public housing, I used to think the best job I could ever get might be to work in a McDonalds. But now I think maybe I could go to college and even own my own business." Improving neighborhoods, facilitating home ownership for low to moderate income families, and inspiring young people are responsibilities we can better carry out when there is a congressional district in North Carolina along the lines of the 12th district that allows one congressional representative to focus on these needs.

Defendant-Intervenors' Exhibit 502 (cont'd)

STATEMENT OF ROBERT L. DAVIS

I, Bob Davis, under penalty of perjury, state as follows:

1. I reside at 1925 Arnold Drive in Charlotte, North Carolina. I have lived in Charlotte all of my life. I attended public school in Charlotte and Johnson C. Smith University in Charlotte. I am a retired educator, having served as a teacher for fifteen years and a principal for twenty years. I am an African American defendant-intervenor in this case and live in the Ninth Congressional District.

2. I am presently Chairman of the Charlotte-Mecklenburg Black Political Caucus, an organization which I helped to found around 1969-70. I have served as Chair of the Black Political Caucus off and on for a period of ten years.

3. I have participated in and observed politics since 1940 when I was twelve years old. From that time, until the present time, Charlotte politics have been characterized by patterns of racial voting. African-Americans sought public office as early as the 1940's, but without success. Fred Alexander was the first African-American to win public office in Charlotte-Mecklenburg when he was elected to the city council in the late fifties or early sixties. Mr. Alexander was an extraordinarily able politician who was able to get elected by getting the overwhelming majority of African-American votes and garnering enough white votes to win in an at-large system. The at-large system never produced more than one African-American council member. It was only after district representation came to Charlotte in the late seventies that we were able to get more than one African-American on the city council. As a result of district

representation, there are now four African-Americans on our eleven member council, only one of whom was elected at-large and even then, by a narrow margin. There has never been more than one African-American Mecklenburg County Commissioner elected at-large. District representation may result in more than one African-American member of the county commission in the 1994 elections. Without district representation, I am convinced that Mecklenburg County would not elect more than one African-American at a time.

4. The only public body in Mecklenburg County that has elected more than one African-American at large in a given election is the school board which presently has two at-large African-American members.

5. I have run for public office myself seeking an at-large seat and, subsequently, a district seat. I was unsuccessful in both. I ran for an at-large seat on the city council in 1982. Although I led the ticket in the first election, I lost in a run-off. The only other African-American running at the time was defeated also.

6. I ran for a council seat in District I, a majority white district, and lost in a run-off election against a white candidate.

7. I do not know of any election in Charlotte where an African-American candidate has ever received a majority of the white votes. It is only through "single shot" or selective voting that African-Americans have been successful in elective politics in Charlotte-Mecklenburg.

8. Notwithstanding that a number of African-Americans have been elected to office and appointed to public bodies in Charlotte-Mecklenburg, racial politics are still prevalent and largely determines the outcome of elections. Even when Harvey Gantt was elected mayor, he never received a majority of the white votes cast.

9. The existence of racial politics in Charlotte has necessitated the continuation of the Black Political Caucus since its beginning in 1969-70. We regularly interview candidates, black and white, to determine their sensitivity and record on the issues of great importance to African-Americans in Mecklenburg County. Some of the issues that continue to be of prime importance to the African-American community and to the Black Political Caucus are:

a. Education - We continue to work to assure racial equity in pupil and teacher assignments and hiring and promotion policies as well as the location of schools and the provision of services.

b. Housing - The housing pattern in Charlotte remains racially segregated, with a few blacks moving into previously all white areas. There are African-American communities which are without running water and which have outdoor toilets.

c. Jobs - Unemployment falls disproportionately upon African-Americans in Charlotte-Mecklenburg. The age old syndrome of being the last hired and the first fired is still evident in too many instances.

d. The Environment - There is a continuing tendency to run highways through the black community thus destroying the culture and cohesiveness of the communities and to locate garbage disposal plants and facilities in African-American communities. Interstate 77 was routed through a large and important black cemetery. Only recently, a lawsuit was necessary to stop the location of a sanitation facility in the heart of the larger black west side community.

10. The west side where most African-Americans live in the city of Charlotte is characterized by large areas of

deterioration, blight and total lack of investment and development. There are no major shopping malls, only one major hotel and very few major retail establishments on the west side.

11. Even when promises are made or plans made to spur interest in or development of the west side, those plans are shelved and left to collect dust. When I served on the planning commission, several years ago, there was a plan to build a gateway to the west side at the bottom of trade street near Johnson C. Smith University. Those plans have never been carried out.

12. I recently received a card from the elections board establishing that I am a resident of the 9th Congressional District. I found the card to be very helpful because we have new county commission and school board districts this year. I recall that in April of 1992 prior to the primary election, the Mecklenburg County Board of Elections sent each voter in the county a similar card which identified the voter's precinct and district for city council, county commissioner, state house, state senate, 26th judicial district and United States Congress. A copy of my new voter card and the envelope in which it was sent are attached hereto as Exhibit A.

13. In all the years that I have lived in the Ninth Congressional District, I have had no contact with Congressman McMillan except when I met him one time. To my knowledge he has not visited regularly in the African-American community of Charlotte-Mecklenburg and has no contact with me in my capacity as Chair of the Black Political Caucus. Congressman Watt, on the other hand, has been very actively involved in the issues that effect our community such as housing, homelessness, crime, education, healthcare and the environment.

14. Congressman Watt's election to the 12th District brought great pride to me and to other African-Americans and white residents of Charlotte-Mecklenburg who

recognized that for the first time in 90 years there would be a voice in Congress to advocate for those issues that are of great importance to the African-American community of Charlotte-Mecklenburg and the entire 12th District. His election made us feel, for the first time, that we were included and that our concerns mattered.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

This 23 day of March, 1994.

/s/ Robert L. "Bob" Davis
Robert L. Davis

MECKLENBURG COUNTY BOARD OF ELECTIONS
741 KENILWORTH AVE STE 202
P O BOX 31788
CHARLOTTE NC 28231-1788

PRESORTED
FIRST-CLASS MAIL
U.S. POSTAGE
PAID
Charlotte, N.C.
Permit No. 548

IMPORTANT VOTER INFORMATION

BEST AVAILABLE COPY

026245 SIGNATURE OF VOTER

SIGN, DETACH, FOLD AND CARRY IN YOUR WALLET

DAVIS, ROBERT L, JR MR.
1925 ARNOLD DR
CHARLOTTE, NC 28205-3857

THIS IS AN IMPORTANT VOTING DOCUMENT

RETAIN THIS CARD IN YOUR WALLET OR PURSE AND DESTROY ALL PREVIOUSLY MAILED VOTER CARDS TO AVOID CONFUSION.

1. In November 1993 voters approved a new district plan for County Commissioners and School Board consisting of six (6) districts.
2. Twenty-three (23) additional precincts and voting places have been created to reduce long lines during major elections.
3. Please note that your precinct number now includes a decimal to accommodate continued municipal annexations and congressional boundaries that cross precinct lines. *Example: 15.19 designates Precinct 15 inside Charlotte (1) and the 9th Congressional District (9).*

To understand your precinct designation, refer to this table.

Congressional (8,9 & 12) (Designation 2nd digit)	Inside the Municipality of Charlotte (1)	Outside Any Municipality (2)	Other Municipalities (3 thru 8)
.08 = 8th District .09 = 9th District .12 = 12th District	.12 = Inside/ 12th Cong. .09 = Inside/ 9th Cong.	.22 = Outside/ 12th Cong. .08 = Outside/ 8th Cong. .09 = Outside/ 9th Cong.	.3 = Cornelius .4 = Davidson .5 = Huntersville .6 = Matthews .7 = Mint Hill .8 = Pineville

ADDITIONAL INFORMATION ON REVERSE SIDE.

MECKLENBURG COUNTY VOTER CARD

Mecklenburg County Board of Elections
741 Kenilworth Ave., Suite 202
Charlotte, NC 28204

William B. Aycock
Supervisor of Elections

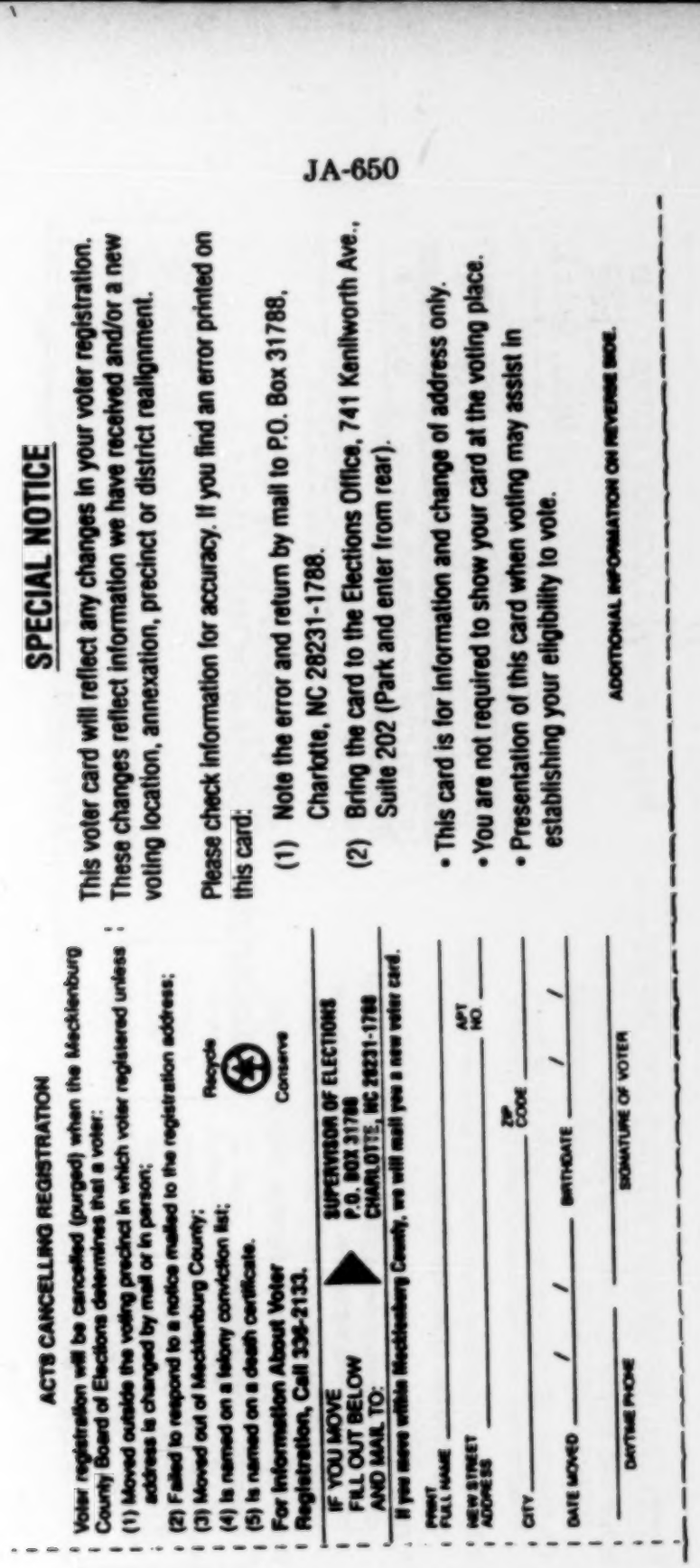
DISTRICTS					
CITY COUNCIL	COMMISSIONER SCHOOL BOARD	STATE HOUSE	STATE SENATE	26TH JUDICIAL	US CONGRESS
1	4	36	40	26B	9

03/01/94	DEM	M	B	029.19
026245	SIGNATURE OF VOTER			

SIGN, DETACH, FOLD AND CARRY IN YOUR WALLET

DAVIS, ROBERT L, JR MR.
1925 ARNOLD DR
CHARLOTTE, NC 28205-3857

MERRY OAKS SCHOOL
3508 DRAPER AVE.



SPECIAL NOTICE

This voter card will reflect any changes in your voter registration. These changes reflect information we have received and/or a new voting location, annexation, precinct or district realignment.

Please check information for accuracy. If you find an error printed on this card:

(1) Note the error and return by mail to P.O. Box 31788, Charlotte, NC 28231-1788.

(2) Bring the card to the Elections Office, 741 Kenilworth Ave., Suite 202 (Park and enter from rear).

- This card is for information and change of address only.
- You are not required to show your card at the voting place.
- Presentation of this card when voting may assist in establishing your eligibility to vote.

ADDITIONAL INFORMATION ON REVERSE SIDE.

ACTS CANCELLING REGISTRATION

Voter registration will be cancelled (purged) when the Mecklenburg County Board of Elections determines that a voter:

(1) Moved outside the voting precinct in which voter registered unless address is changed by mail or in person;

(2) Failed to respond to a notice mailed to the registration address;

(3) Moved out of Mecklenburg County;

(4) Is named on a felony conviction list;

(5) Is named on a death certificate.

For Information About Voter Registration, Call 336-2133.

Recycle

Conserve

IF YOU MOVE FILL OUT BELOW AND MAIL TO:

SUPERVISOR OF ELECTIONS
P.O. BOX 31788
CHARLOTTE, NC 28231-1788

If you move within Mecklenburg County, we will mail you a new voter card.

PRINT FULL NAME _____

NEW STREET ADDRESS _____ APT NO. _____

CITY _____ ZIP CODE _____

DATE MOVED ___/___/___ BIRTHDATE ___/___/___

DAYTIME PHONE _____ SIGNATURE OF VOTER _____

BEST AVAILABLE COPY

Defendant-Intervenors' Exhibit 502 (cont'd)

DECLARATION OF EDDIE DAVIS III PURSUANT TO 28 U.S.C. 1746

EDDIE DAVIS III hereby declares as follows:

1. My name is Eddie Davis III. I am a native of North Carolina and have lived in the City of Durham for the past fourteen years. I am an African American defendant-intervenor in this lawsuit. I am a teacher at Hillside High School, which is located in Durham. I serve on the Board of Directors of the National Education Association, which is a national organization with a membership of 2.1 million teachers dedicated to improving the working conditions of teachers and the quality of education in general. I also serve on the Board of Directors of the North Carolina Association of Educators and the North Carolina People for the American Way. In addition, I was appointed by Governor Hunt last year to serve an eight year term on the State Board of Education. I am an active member of the People's Alliance and the Durham Committee on the Affairs of Black People. My address is 119 Masondale Avenue, Durham, North Carolina 27707-3151.

2. Housing in Durham is segregated along racial lines. I reside in a predominately African American area of Durham known as the Hillside Community. Along with other African American communities in Durham, such as Old North Durham, the Hillside Community is located in the urban core of Durham. The urban core has been abandoned by white suburbanites and many upwardly mobile African Americans. It is a racially segregated community that is isolated socially and economically from the mainstream of Durham. This stark isolation results in a variety of disturbing, systemic problems that confront the adult residents in the community and the students that I teach at Hillside High School.

3. Economically, the urban core of Durham is severely depressed. For the past 25 years, there has been very little construction or economic growth in the urban core. Although the Research Triangle area of North Carolina has one of the lowest unemployment rates in the state and the nation, the unemployment rate for African American residents in the urban core is significantly higher than it is for whites in Durham. The technically sophisticated jobs that exists [sic] in the Research Triangle area are simply out of the reach of the vast majority of African Americans residing in the urban core. High-paying, stable jobs requiring specialized skills at IBM, a major corporation located in the Research Triangle, are simply not available to a majority of African American residents in the urban core. In addition, other businesses in the area, such as the American Tobacco Co. and the Durham Hosiery Mill, have downsized or disappeared, thereby eliminating jobs that were once accessible to African Americans residing in the urban core.

4. Segregated housing patterns in the City of Durham and the failure to obey and enforce desegregation laws have led to a resegregated public school system. For example, Hillside High has a student population of approximately 1000. Out of the total student population, approximately five of the students are not African American. In is not unusual for African American students in the inner core to attend all-black Fayetteville Elementary, all-black Shepard Middle School and virtually all-black Hillside High. In other words, it is common for these African American students to go from kindergarten through the twelfth grade and never have a white classmate. The lack of enforcement of desegregation laws in Durham has created a situation in which social isolation has spawned a unique culture and social perspective that is distinctively African American and, indeed, separate and quite foreign to the white community.

5. For example, African American kids in the urban core develop a separate manner of speech, which oftentimes hinders their ability to compete in the job market with whites who communicate with prospective white employers in a language that they are comfortable with. The experiences of African American children growing up in the depressed urban core lowers their self-esteem and creates feelings of worthlessness. On weekends, many of my students at Hillside "hang out" at local malls where they come into contact with whites who have more resources and material possessions than they do. Their contact with whites in the "outside" world suggests that they have no control over their destiny, as doctors in community clinics and merchants from whom they purchase goods and to whom they pay bills are often white. After being bombarded with images in the media that portray whites in a positive light and African Americans negatively, they compare their life situations with that of whites and conclude that their lives have no value. This conclusion often leads to destructive attitudes regarding education, conflict resolution and family planning.

6. There is a lack of educational achievement among African American students at Hillside High. Due to segregation and discrimination, both subtle and overt, and wholly inadequate funding for education in the community, African American students in the urban core are not realizing their potential. They have no American dream. The attrition rate at Hillside High is approximately 50%. Approximately 400 student[s] enter Hillside High as freshmen; four years later, approximately 200 graduate. While approximately 60% of Hillside graduates attend either a two-year or four-year educational institution, studies at the University of North Carolina show that a significant percentage of African American students do not return for their sophomore years. Given the level of unemployment in the urban core, many African American students do not see education as having any

value for them. Their experiences dictate that when they grow up, they will be either under-employed or unemployed.

7. African American male students at Hillside High are at risk of extinction. Approximately 45% of the students at Hillside High are males. Of this percentage, approximately 35% have had some contact with the criminal justice system. Male students at Hillside High feel that it is no big deal to leave school to attend a criminal court hearing. The principal at Hillside routinely goes to criminal court to testify regarding the character of students attending the school. Indeed, lawyers often come to school on behalf of students who have broken school rules and argue that a possible suspension could result in a violation of parole.

8. The pregnancy rate among African American females at Hillside is approximately 10%. There is also a high rate of sexually transmitted diseases among students at the school. I currently have one student in my homeroom who is pregnant. At seventeen years of age, she is not emotionally ready to care for a child. I have counselled her about receiving proper medical care and avoiding physical confrontations, since fighting could possible [sic] damage her unborn fetus. As with other students at Hillside who have children, her prospects of achieving in life will be significantly lessened.

9. Violence is an issue of urgent concern in the urban core. There have been shootings at Hillside High. Guns, knives and other weapons have been confiscated on school grounds. School rules at one time prohibited students from carrying book bags, since they can and, in the past, have easily concealed weapons in the bags. Children can now only carry transparent book bags to school. Two years ago, a few blocks from school a student was slashed across the neck by another student with a box opener. Some of the violence stems from the

sale and use of drugs, as some students have been arrested for possession and distribution of illegal narcotics.

10. Adequate health care is another issue of major concern in the African American urban core. As mentioned in paragraph 8, there is a high incidence of sexually transmitted disease and pregnancy among students in the urban core. The Lincoln Community Health Clinic serves the African American community in Hillside. To the average middle class resident of Durham, health care at Lincoln is not adequate. Also, the resources of the clinic are not sufficient to meet the needs of the entire community. Long waits for service are common, and my students often complain about a lack of respect that is exhibited toward them by health care providers.

11. The creation of the Twelfth Congressional District is necessary for residents in the urban core to enjoy democratic representation. The district is urban-based, linking the major cities in North Carolina. There is a constituency of urban poor residents that have severe problems which need addressing. Poor urbanites in Gastonia have commonalities with poor urbanites in Durham, such as crime, high unemployment, and deteriorating schools. Indeed, poor urbanites in Durham have more in common with poor urbanites in Gastonia than they do with residents that are the "haves" in Durham.

12. Congressman Watt, the candidate of choice of African Americans and progressive whites in Durham, is committed to addressing and solving problems facing poor urbanites, including those residents in Durham's urban core. Congressman Watt understands the legacy of segregation and discrimination that is partly responsible for the current state of despair in the African American community. His agenda involves addressing problems plaguing urban residents, which include inadequate education, high unemployment, inadequate health care, substandard housing and violence. During the 1992 congressional election campaign, he came to Hillside

High to debate his Republican opponent. At the debate, he discussed his vision to provide an adequate opportunity to residents to achieve skills in order to secure stable jobs which will stabilize family structures. Congressman Watt has empathy for the urban poor. He has also opened an office in the inner core of Durham, indicating his willingness to be accessible and connected to the community. As a initial step toward solving some of the problems of the urban poor, he is currently scheduling a town meeting in the urban core to deal with the issue of the plight of African American males.

13. The Twelfth Congressional District is also necessary because for the first time in the modern history of North Carolina, African American voters have been given the opportunity to participate equally in the political process and elect their candidate of choice to Congress. In addition, for the first time in recent memory, the urban poor have a voice in Congress. The previous representative of the area, Tim Valentine, was not committed to deal with the systemic problems facing the African American community. As a Conservative Democrat, he seldom came to the African American community until election time. During his initial time in office, he had an office in the inner core of Durham; however, he subsequently moved the office to the suburbs. Tim Valentine was more connected to rural issues. His weakness during his tenure as a Congressman was that he was less experienced in dealing with urban issues than rural issues.

14. Prior to the creation of the Twelfth District and the election of Mel Watt, my students at Hillside, in an indirect way, felt further alienated from the mainstream of society. Role models are important in the struggle to free the African American community from its present state of despair. Congressman Mel Watt serves as an important role model for my students. The students thoroughly enjoyed the political debate at Hillside High between Congressman Watt and his opponent; both they

and I appreciated the respect and attention he accorded them and the direct manner in which he answered their questions. More importantly, his election showed the students that they can reach high political office in North Carolina if they work hard and achieve. As a role model, Congressman Watt is known and respected by the students. During the campaign, Mel Watt's campaign slogan was "Let's Give Em Mel". Fully one year after the campaign, the students still repeat this slogan.

15. The Twelfth Congressional District is also needed because while African American candidates have had some measure of success in Durham County, African American voters have been subjected to subtle and overt intimidation in the exercise of their opportunity to elect their candidate of choice. I have been politically active since I moved to Durham fourteen years ago. I actively participated in the 1982 Henry Michaux campaign for Congress by canvassing door to door, stuffing envelopes, attending informational meetings about the candidate and speaking at meetings on behalf of the candidate. Michaux's opponent, Tim Valentine, engaged in racial appeals. Letters were distributed in the white community warning white voters that Michaux was going to *bus* African Americans to the polls to bloc vote. In addition, Valentine ran radio ads designed to instill fear in the minds of white voters regarding the prospect of the election of an African American to Congress.

16. I also participated in the Harvey Gantt campaign for the United States Senate. Prior to the election, Jesse Helms ran television advertisements in Durham that stated that African Americans were responsible for taking jobs away from whites. The ad concluded that the election of Gantt would accelerate the alleged practice. On election day, whites dressed in suits who claimed to be from the "State" came to a majority African polling place and demanded to see the total vote count. The intimidated African American poll workers, including my

wife, released the totals to them. It was later learned that they were not from the State Board of Elections, but rather from the State Republican Party.

17. The election of African American candidates in Durham is dependent upon two factors - African American single shot voting and the white crossover vote. A few years ago, the Durham City Council was majority African American. One African American councilmember, Clarence Brown, allegedly mismanaged public funds. During the following elections after the announcement of these allegations, all except two African American councilmembers lost their bids for reelection despite overwhelming support from the African American community. The one-term African American mayor also lost his bid for reelection. Thus, white voters essentially punished African American elected officials for the alleged offenses of one African American councilman.

18. Many hard-working, caring citizens in the African American community are working to save African American youth. For example, I recently assigned as a reading project to my class at Hillside High an excerpt from a *Newsweek* article taken from a book by Nathan McCall entitled "Makes Me Wanna Holler". The author is an African American who was raised in a segregated neighborhood and concluded that his life was meaningless and had no worth. He turned to a life of crime and eventually served three years in prison for armed robbery. While in prison, he found that his life had meaning. Upon release from prison, he graduated from college and is presently a reporter for the *Washington Post*. My students read the article and some were inspired by the message that achievement is within the reach of every individual, regardless of personal circumstance. However, the problems identified above which afflict residents of the urban core cannot be solved through individual initiative alone. An effective voice in Congress who can engage the democratic process on behalf of the urban

poor is necessary for residents of the urban core to overcome their problems. Thus, the ability of these residents to participate equally in the political process and elect their candidates of choice must be preserved.

I DECLARE under penalty of perjury that the foregoing is true and correct.

EXECUTED on this 24th day of March, 1994.

/s/ Eddie Davis III
EDDIE DAVIS III.

Defendant-Intervenors' Exhibit 502 (cont'd)

STATEMENT OF ELLEN EMERSON

I, Ellen Emerson, under penalty of perjury, state as follows:

1. I reside at 903 Lexington Ave., Greensboro, Guilford County, North Carolina. I am 50 years old. I am a white defendant-intervenor in this case. I live in the Twelfth Congressional District.

2. I have been Chairman and Executive Director of the Guilford County Democratic Party. I was Chairman during the 1990 Gantt-Helms Senate race. I recall that during the last week of the election that year a number of people came to the party headquarters and reported that they had received a postcard in the mail stating something to the effect that they could not vote if they had moved within 30 days of the election. I specifically remember some of the people who received the card, including Herman Gist and John Erwin of Greensboro and Pat Milburn of High Point. All of the people who I know received the postcard were black.

3. I was Chair of the Guilford County Democractic Party when the first election was held for the Twelfth Congressional District. This was the primary in May of 1992. Here in Guilford County, when the split was made between the Sixth and Twelfth Districts, the Board of Elections sent out voter cards to all affected voters telling them what district they were in for each public office. This was done well ahead of time. People affected by the change had prior information about their new district. Of course, even many educated people do not pay attention to a mailing from the Board of Elections. At party headquarters we received some calls from voters who were unsure which district they were in. But in my experience this has happened every single time there has been a change in any district, and sometimes

even when there has been no change. We always have people calling saying, "can you tell me where I vote, who are the candidates?" We had no more of this in 1992 than previously, at least with respect to Democratic Party headquarters.

4. As a resident of the Twelfth Congressional District I have found that there are many important concerns shared by people throughout the district. I have participated several times in the Twelfth Congressional District convention. At these events, blacks and whites have come together in the same auditorium to discuss things that were on everyone's minds. I would estimate that more of the participants were black than white, but white citizens were well-represented and people of both races participated fully in the convention, speaking out on the issues.

5. One of the concerns shared by blacks and whites in the Twelfth Congressional District is obtaining better, higher paying job[s] for the region. Recently we had the announcement that a new postal facility would be located in Greensboro, employing 550 people in jobs paying $10 to $15 per hour. Congressman Watt was here for the announcement. He has supported our goal of getting better jobs into our community. He supported the President's economic stimulus package which was one way we had hoped to get jobs into our community.

6. Both black and white people in the district are concerned about inner-city issues, urban crime, education, and economic development. We are also concerned about the budget. These are issues we have in common.

7. As a resident of the Twelfth District I receive a detailed advisory newsletter from Congressman Watt's office on a monthly basis. The newsletter tells about what is going on in Congress and what bills are pending. The Congressman also reports on the committees he is serving on and what they are doing. One of his commit-

tees is banking, which is very important to us because of the financial industry in the district. The newsletter includes Congressman Watt's entire schedule for the month, including all meetings. It addresses issues which are of common concern to black and white voters in the district. Some issues I can remember seeing in the newsletter are the budget, education, crime, community lending, issues included in the Clinton Agenda — anything that is considered a major issue by the American people. The Congressman explains his views and thoughts on the issues. The newsletter is not exclusively oriented toward a "black agenda," although issues which I know to be of importance to the black community have certainly been addressed thoroughly.

8. Congressman Watt has established satellite offices throughout the district so that people are able to have access to him. This service was never provided by my previous congressman, Howard Coble.

9. As a white voter, I have not in any way felt excluded from the political process since being included in the Twelfth Congressional District. In fact, when the district was first announced, I did not think anything about it. I saw no problem with it. I could see the various institutions and commonalities throughout the district. I think you could go anywhere through the district and find people have concerns much along the same lines. We have a lot of commonalities as people, living along the I-85 corridor in some of the largest and most urban cities in the state, having a similar economic base including textiles, furniture and financial institutions. We share a similar southern urban culture. While there are black and white aspects of that culture, we do in many ways have a common history and culture. The Twelfth District is also an area which has received an influx of northerners in recent years. This is true in many parts of the district, but particularly in the cities where many major corporations have relocated. The addition of non-southerners into our communities has made us a bit less provincial than other parts of North Carolina.

10. I have not found that race has been at all a divisive issue in the Twelfth Congressional District. In fact, when Mel Watt was running for Congress in the new district, there was a great coming together of people who would not normally come together. There was a lot of interaction between blacks and whites. There was a discovery for a lot of white people that when they spoke with Mr. Watt or other black people at events that we were not that different. It has been my experience, as involved as I have been in politics, that the Twelfth District has done a great deal to bring people together where they were formerly separate.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

This 22 day of March, 1994.

/s/ Ellen F. Emerson
Ellen Emerson

Defendant-Intervenors' Exhibit 502 (cont'd)

[Letterhead of Congressman Melvin L. Watt, House of Representatives
Washington, D.C. 20515-3312]

Advisory Newsletter
February 1994

Mel's Comments

Dear Friend,

Congress will tackle a slate of issues in 1994 that will affect every American. These issues will certainly include crime and health care reform and may well include welfare reform and jobs.

One issue I hope will not get lost in the busy agenda is the issue of worker retraining. A comprehensive worker retraining initiative would help crime, welfare, jobs and even health care reform legislation.

I was told by the Secretary of Labor Robert Reich last year during our NAFTA discussions that the administration planned to propose worker retraining legislation to Congress in 1994. Since then I have been working with Secretary Reich and several other members of Congress to help shape the legislation and to help focus the debate. We have identified two important objectives - one dealing with the legislation itself and one dealing with the focus of the debate.

First, we believe it is necessary for training and retraining to be linked to jobs if training programs are to work. Too often in the past training programs employed participants temporarily but provided no long term employment prospects. Our objective will be to assure that the new legislation assures newly trained workers an existing or new job.

Second, we believe it is important to acknowledge the fact that worker retraining legislation will benefit employers, employees *and* taxpayers. Worker retraining

benefits workers by providing them the skills needed to obtain work. But it also benefits employers by providing skilled workers who are trained to do the jobs employers have available and it benefits taxpayers by getting unemployed people off welfare and unemployment roles and by expanding the tax base. Workers, employers and the public will need to help galvanize the political support needed for passage of this important training and retraining initiatives.

I hope you will support my efforts to get new worker retraining legislation enacted. I will keep you informed of these efforts.

Legislative Update

OUTLOOK FOR 1994: THE HOUSE. The House of Representatives reconvened on January 25. President Clinton delivered his State of the Union address and presented the Administration's objectives for the coming year to Congress and the nation.

The House agenda is full of issues which could have substantial impact on the 12th district. The need to reform our nation's health care system and ensure quality, comprehensive medical care for every American will take center stage. Also in the spotlight will be the President's budget (to be submitted early in February) and legislation addressing the crime epidemic. Earlier this month, Mel was in Washington to hear testimony from Administration officials and representatives from groups dedicated to reducing crime. Discussion focused on the impact of crime in minority and urban communities and on how best to prevent criminal behavior before it occurs.

Other major issues the House may consider this year include reform of the welfare system and worker training. An education bill providing federal funding for elementary and secondary schools will be considered and

the House is planning to take on highway and mass transportation issues as well. Congress may continue its efforts to overhaul its own rules and laws governing how federal campaigns are financed. A major international issue to be addressed will be the General Agreement on Tariffs and Trade (GATT), a worldwide trade pact that will affect nearly all U.S. industries in some way.

COMMITTEE OUTLOOK: In addition to continuing its work on crime legislation, the JUDICIARY COMMITTEE will take up telecommunications issues including the Administration's plans for an information "superhighway" and whether to allow local telephone companies into the long-distance telephone market. The committee will also look at claims made against the federal government by victims of radiation exposure. Laws covering the activities of lobbyists will be considered, as will an expired law providing for the appointment of an independent prosecutor in certain cases of alleged wrongdoing by high-level government officials.

The BANKING, FINANCE AND URBAN AFFAIRS COMMITTEE will focus on a major piece of legislation governing the nation's housing and homelessness programs. New regulations for the Community Reinvestment Act, a key law intended to ensure fair lending practices by banks, will also be on the committee's agenda. The committee will look closely at proposals to combine the many different government agencies which oversee banks, savings and loans and other types of financial institutions.

The POST OFFICE AND CIVIL SERVICE COMMITTEE will continue hearings on how health care reform will affect federal employees. The committee will also continue its oversight of the postal service, addressing such issues as efficiency and workplace violence.

Artistic Discovery

Each year, Members of the U.S. House of Representatives join together to recognize the creative spirit of American high school students in a nationwide art competition. "An Artistic Discovery" is the name of the 13th Annual Congressional Art Competition. Any student who lives in the 12th Congressional District is eligible to participate. Each high school may enter one piece of art and each student may submit only one work of art based upon specified guidelines. The winning entry will be displayed in Washington during the annual exhibition in a corridor of the U.S. Capitol. My office has sent brochures detailing the program to high schools in the 12th district. For further information, contact your local high school or one of my district offices.

Earned Income Tax Credit

Many low-income working families in the 12th district are eligible to receive up to $2,287 under the 1993 Earned Income Tax Credit (EITC). Even more families are eligible in 1994. The EITC will also boost our economy by bringing an infusion of federal funds to low-income, working families.

The EITC is a tax credit for working couples and individuals with children. To qualify, families must have an earned income of less than $23,050 in 1993 and have at least one child under age 19 living with them. This credit can be as much as $2,287. The EITC is a refundable credit, which means families can benefit even if they do not owe federal income tax. For families that do owe taxes, the EITC can greatly reduce the amount.

To receive the EITC, families must file Form 1040A or Form 1040 and attach Schedule EIC. Schedule EIC can be obtained from the local IRS office or by calling 1-800-TAX-FORM (1-800-829-3676).

In 1994, the Earned Income Tax Credit is greatly expanded to include families with no children. About 52,000 families in the 12th district will be eligible for the EITC. Qualified families may be able to receive up to $102 each month along with regular pay by filing Form W-5. Form W-5 can be obtained from the employer or by calling 1-800-TAX-FORM. Employers should take special care to inform their employees about the EITC.

Income Tax Assistance

Through the Volunteer Income Tax Assistance(VITA) program, trained volunteers located throughout each county will help citizens complete their income tax forms. In addition, the Elderly Tax Counseling(ETC) program provides assistance to older citizens filing their income taxes. For a listing of the VITA and ETC sites in your county, please contact one of my district offices.

Senior Citizen Intern Program

The Congressional Senior Citizen Intern Program is an opportunity for senior citizens to participate in a week-long internship in the nation's capital. Interns will take part in a series of seminars, workshops, and on-site study visits designed to expose them to the people and processes involved in the development of public policy.

The program is scheduled for May 14-21, 1994. The cost of $908 covers in-town transportation, meals, and lodging. Interns must provide their own transportation to Washington. To be eligible an applicant must be at least 60 years old and in good health (the internship will involve a large amount of walking). Please contact one of my district offices if you live in the 12th District and would like to receive application information.

Academy Nominations

I am pleased to announce that I have made Congressional Nominations of the following students to the U.S. Service Academies:

- January B. Pulliam, Rowan County, Air Force Academy
- Daniel Christopher Easley, Durham County, West Point
- June Alisha Cruse, Rowan County, Naval Academy
- Arvie LaShawnte Polk, Mecklenburg County, Naval Academy

AmeriCorps

The National and Community Service Trust Act of 1993 created a national service program called AmeriCorps to encourage community service while helping volunteers pay for higher education. AmeriCorps will employ 20,000 high school graduates, college students, and college graduates for one to two years starting next September. Potential jobs areas include teaching, low-income housing construction, environmental conservation and many more. Participants will earn the minimum wage, or $7,425 per year, health benefits, child care benefits (if needed), and $4,725 in college or vocational school tuition or loan forgiveness.

Local governments and nonprofit service groups will be selected to provide the service opportunities for AmeriCorps. Although Federal regulations and grant guidelines will not be finalized until Spring of 1994, organizations planning to submit proposals should be aware of the upcoming opportunities.

Approximately $51 million will be allocated by the Corporation for National and Community Service to states that submit plans approved by the Corporation according to a population-based formula. **The North Carolina State Commission on Community and National Service, appointed by Governor Hunt, will choose local**

programs that will compose North Carolina's plan. The State Commission will hold regional briefings in late February and March that will detail the application and selection process. To receive more information regarding these hearings as it becomes available, call 1-800-443-3961.

In addition, approximately $48 million will be allocated directly by the Corporation for National and Community Service. National nonprofit and multi-state programs are invited to apply directly to the Corporation.

For more information about AmeriCorps write to the Corporation for National and Community Service, 1100 Vermont Avenue, NW, Washington, DC 20525 or call 1-800-942-2677. My office will provide more detailed information as it becomes available.

Marketplace '94

Mel and several other members of the North Carolina delegation are co-sponsors of Marketplace '94: Procurement Opportunities for Small Businesses. Marketplace '94 is designed to bring sellers from small businesses together with buyers from the Federal Government and large prime contractors. Representatives from small businesses may circulate through the buyers' booths to directly market their goods and services.

In addition to providing a setting to make contacts, Marketplace '94 offers an excellent opportunity to learn about the federal procurement process. A series of seminars will be conducted by government officials and National Contract Management Association members. Seminar topics include the following: "An Introduction to Procurement," "Legislative Update," "Proposal Writing," and "Marketing to MWR and PXs."

In the past, more than 500 attendees and 60 booth sponsors have participated in the conference.

The conference will be held Tuesday, April 5, 1994 at the Sheraton Imperial in Research Triangle Park, NC. There is an attendee fee of $45. The booth fee for prime contractors is $175.00. To receive an application, contact one of my district offices.

Mel's Schedule

Mel's schedule includes the following commitments confirmed at press time:

- January 31, Policy and Practice for Community Development Financial Institutions sponsored by Center for Community Self Help
- February 4, Keynote address, 7th Congressional District Black Caucus Meeting, Bolivia, NC
- February 8, 10:00AM Subcommittee on Consumer Credit and Insurance hearing to examine proposed Community Reinvestment Act regulations
- February 17, 7:00PM League of Women Voters Health Care Forum with Mel and Congressman McMillan, Government Center, 600 E. Fourth Street, Charlotte
- February 18, Dedication of Durham Housing Authority Senior Citizen Housing Complex, Durham
- February 24, Triad Chambers of Commerce panel discussion with Mel and Representatives Valentine and Price, Washington, DC

Fixed Offices

The following offices are open daily from 9:00AM to 5:00PM:

- 1232 Longworth HOB, Washington D.C. 20515, (202) 225-1510
- 214 N. Church Street, Suite 130, Charlotte, NC 28202, (704) 344-9950
- 301 S. Greene Street, Suite 210, Greensboro, NC 27402, (910) 379-9403

- 315 E. Chapel Hill Street, Suite 202, Durham, NC 27701, (919) 688-3004

In addition, the Winston-Salem office at 2301 Patterson Avenue is open on Tuesdays from 9:00AM to 4:30PM.

Satellite Office Schedule

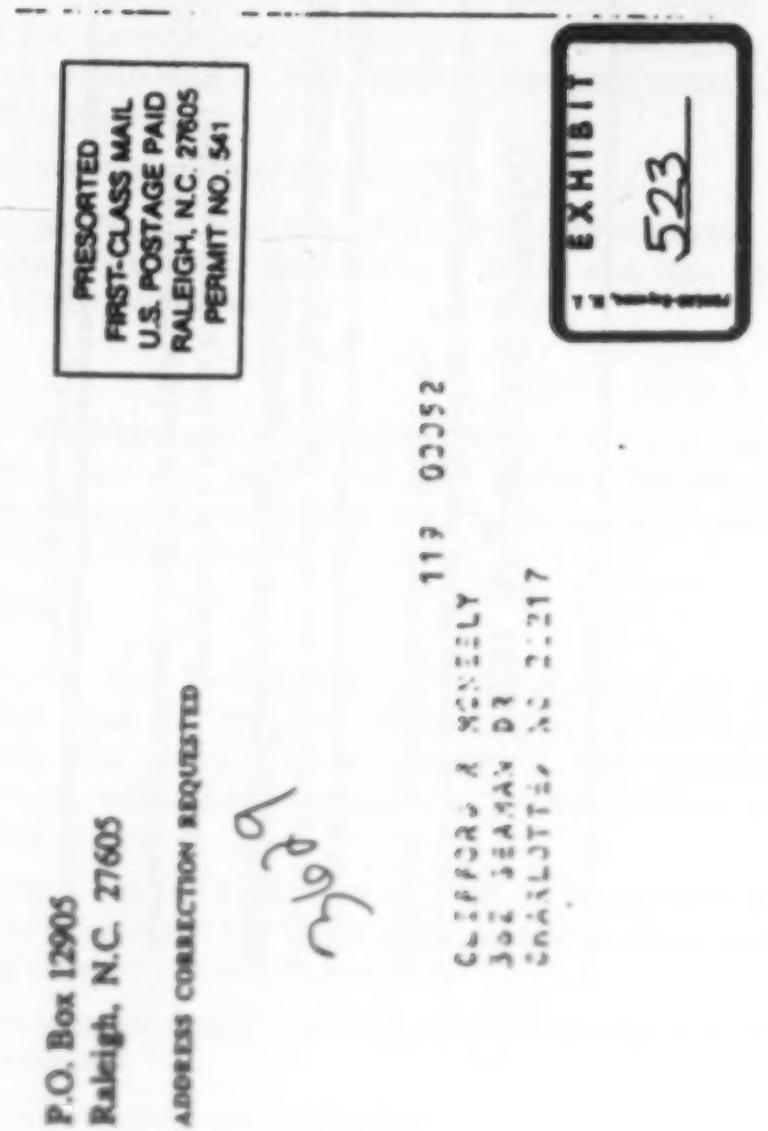
In order to provide congressional services to all constituents in the 12th district, the mobile office aide will continue to maintain regular office hours in municipal offices throughout the district. The satellite office schedule for December includes:

- February 1, 9:00AM-12:00PM, Salisbury City Hall, Room 202, 132 N. Main Street, Salisbury
- February 1, 1:00PM-4:00PM, Spencer City Hall, Office of the Mayor, 600 S. Salisbury Street, Spencer
- February 2, 9:00AM-12:00PM, Lexington City Hall, Council Chambers, 28 W. Center Street, Lexington
- February 2, 1:00PM-4:00PM, Thomasville City Hall, Conference Room, 10 Salem Street, Thomasville
- February 3, 9:00AM-12:00PM, High Point City Hall, Conference Room 5, 3rd Floor, 211 S. Hamilton Street, High Point
- February 3, 1:00PM-4:00PM, Jamestown City Hall, Council Chambers, 301 E. Main Street, Jamestown
- February 4, 9:00AM-12:00PM, Burlington City Hall, Council Chambers, 425 S. Lexington Street, Burlington
- February 4, 1:00PM-4:00PM, Haw River City Hall, Council Chambers, 403 E. Main Street, Haw River
- February 7, 9:00AM-12:00PM, Statesville City Hall, 2nd floor, 301 S. Center Street, Statesville
- February 7, 1:00PM-4:00PM, Mooresville City Hall, Municipal Court Room, 413 N. Main Street, Mooresville
- February 8, 9:00AM-12:00PM, Gastonia City Hall, Office of the Mayor, 181 South Street, Gastonia

Defendant-Intervenors' Exhibit 523

POSTCARD ADDRESSED TO CLIFFORD R. McNEELY

[front]



[back]

Voter Registration Bulletin

If you moved from your old precinct over 30 days ago, contact the County Board Of Elections for instructions for voting on Election day.

When you enter the voting enclosure, you will be asked to state your name, residence, and period of residence in that precinct. You must have lived in that precinct for at least the previous 30 days, or you will not be allowed to vote.

It is a Federal crime, punishable by up to five years in jail, to knowingly give false information about your name, residence, or period of residence to an Election Offical.

PAID FOR BY THE N.C. REPUBLICAN PARTY

EXCERPTS FROM DEPOSITION OF GERRY F. COHEN

November 12, 1993

• • • •

[178] Q. Is it fair to say that the principal reason for [179] the construction of District 1 in this configuration was to create one of two majority minority districts in North Carolina?

(Witness and counsel confer.)

A. I would say that that was the principal reason for drawing this district, yes. I have testified also that there were other reasons as well.

• • • •

[328] Q. When you received the letter, was your interpretation at that point that the Justice Department would not grant preclearance unless two majority minority districts were created?

A. Yes.

[329] Q. And by majority minority districts, did you construe that as meaning districts with a sufficient majority—say about 55, 56 percent of the registered voters—in order to take account of voting patterns and that type thing?

A. Well, I think I testified that 56 to 50 percent (sic) was total population. I think I had said that voter registration about 53 or 54 percent.

Q. So you concluded that two districts of that sort had to be created?

A. From reading the letter, yes.

• • • •

EXCERPTS FROM DEPOSITION RUTH AGNES OLSON SHAW

October 27, 1993

• • • •

[7] A. In Durham, North Carolina, 1210 Anderson Street.

Q. How long have you resided at Anderson Street?

A. Since 1958, 35 years.

Q. Who is your congressman?

A. Mel Watt.

Q. Then you reside within the 12th Congressional District?

A. I do.

Q. Have you had any contact with Mr. Watt or his office since he was elected?

A. No, I haven't.

Q. Have you had any contact with any congressperson in the last year or year and a half?

A. No, I have not.

Q. Have you had any contact with the staff of any congressperson in the last year?

A. I have not.

Q. Were you active in Mr. Watt's political campaign?

[8] A. No.

Q. Have you ever been active in any political campaign?

A. Oh, yes. Yes, I have.

Q. Have you ever been active in the political campaign of any candidate for Congress?

A. I have been active as a contributor. And one year, I think—no, he was running for governor. No.

Q. So you have been——

A. (interposing) Excuse me—yes, Nick Galifianakis' campaign years ago.

Q. So you have contributed to candidates for Congress in the past?

A. Yes, I have.

Q. And you recall, as I understand it, in particular that you worked with Nick Galifianakis when he was a candidate for Congress?

A. Yes, I did.

Did that work include political campaigning in addition to contributions, working in his campaign in some respect or——

A. (interposing) No, it was more like licking stamps and sending out envelopes.

Q. Can you help me with when Nick Galifianakis first ran for Congress? I don't recall. Do you recall?

[9] A. It was in the '60s. I don't know the date.

Q. Have you been active in political campaigns other than campaigns for Congress?

A. Yes, Terry Sanford's for Governor, Richardson Pryor for Governor, local candidates. Let's see. My activity in partisan politics varied because if I had a job with the League of Women Voters, who are nonpartisan, I wasn't in it. When I was a registrar and later on the Board of Elections I was nonpartisan. So at those times, I did not participate in any partisan elections.

Q. Have you ever participated in the campaign of any black person for political office?

A. No, only in general ways like taking people to the—black people to the polls to vote.

Q. Are you a registered Democrat?

A. Yes.

Q. Have you always been a registered Democrat?

A. I have.

Q. Did you vote in the last congressional election?

A. I did.

Q. Did you vote for Mel Watt?

A. I did.

Q. You did or didn't?

A. I did.

Q. Prior to the most redistricting of the [10] congressional districts, what district did you reside in?

A. 12th—I mean, no, the 2nd.

Q. And who was your member of Congress at that time?

A. Tim Valentine.

Q. At any point did you request assistance of any type from Congressman Valentine's office?

A. I did not.

Q. And I assume that that would include no—well, let me put it this way: then you had no contacts with Congressman Valentine or his staff?

A. That is correct.

Q. Ms. Shaw, did you attend any public hearing held by the North Carolina General Assembly at any time regarding the proposed congressional redistricting plan?

A. I did not.

Q. At any time did you attend any session of the legislature at which the legislature was considering congressional redistricting?

A. I did not.

Q. Did you attend any committee meetings?

A. I did not.

Q. At any point did you have any contact with any member of the North Carolina legislature——

A. (Interposing) No.

Q. ——regarding redistricting?

[11] A. No.

Q. At any point did you write any letters to any member of the North Carolina General Assembly——

A. (Interposing) No.

Q. ——regarding redistricting?

A. I did not.

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[19] Q. Ms. Shaw, do you know of any reason that Representative Watt cannot represent your interest as a white citizen?

A. He can represent me when I agree with him. If we disagreed on a point, why would my opinion make any difference? The district has been set up for a certain group which I am not a member of. And if he wants to be re-elected, he is going to vote according to the wishes of that group. I would think that the majority of the time, yes, he would represent me, but only when there wasn't something that we [20] disagreed on.

Q. Well, let me ask you this, Ms. Shaw: how then does Representative Watt differ from any other elected public official?

A. Because they look at their district and they see who is in it and who is going to support them. He wouldn't care if I supported him or not. I think that the African Americans in the other ten districts may be shunted aside also because they wouldn't have a numerous number to make enough difference in an election. So they are just as disenfranchised as I am.

Q. Is it your testimony that you are disenfranchised because your representative in Congress is a black citizen?

A. No, because he is the representative of a district that was made for a black citizen. If he was a representative in my district that had not been set aside for minorities, he would then be my representative.

Q. What facts do you rely upon in making the statement the district was set aside for minorities?

A. From what I understand, the United States government, the Justice Department, said that they had to have two minority districts. And when the one was made, that wasn't enough, so they created the second one, which was the 12th District.

Q. Is that the only fact you rely upon in making the [21] statement that this district was set aside for minorities?

A. The fact that I read in the paper, yes, that it was set aside for minorities.

Q. Is there any other fact upon which you rely in making the statement that this district was set aside for minorities other than the U. S. Department of Justice actions?

A. The fact that the result was that there are more minorities in the district.

Q. Do you know the percentage of minority population within the 12th District?

A. No.

Q. Do you know the percentage of minority persons of voting age in the 12th District?

A. I do not, but I saw some figures in the paper that were something like 52 to 48 percent, something like that. And I may be very wrong on that. My memory may be wrong.

• • • •

[36] Q. Did Tim Valentine ever cast any vote with which you disagreed?

[37] A. Many.

Q. Were you as a consequence of the view that he was unable to represent you?

A. No, because I could discuss with him. If I saw him, I said, "I didn't like your vote on that." I could call in and protest.

Q. To your knowledge has Mel Watt cast any vote with which you disagree?

A. Not that I remember, but I am not sure. I haven't seen his complete voting record. I don't know.

Q. If he were [to] do so, would it be possible for you to contact his office?

A. It would be possible for me to.

Mr. Speas: I don't think I have any other questions.

The Witness: May I say something?

By Mr. Speas:

Q. Certainly.

A. I would very willingly vote for Mr. Watt at any time. I am sure that he represents me better than others.

It is the fact—it is the fact that if we don't agree that I would have no influence.

Q. Your concern is that the approximately 48 percent of the voters in the 12th District who are white have no influence on Mr. Watt?

[38] A. Very little.

Q. On what factual basis do you conclude that the 48 percent of the white voters in the 12th District have no influence on Mr. Watt?

A. Because if the same proportion of blacks and whites turned out to the polls, that 52 percent—the percentage of that 52 percent are the people who are going to put him in office. And since that district was made specifically for him, the likelihood would be very great that he would be elected again.

• • • •

[41] Q. You testified also that if you disagreed with him, you could call him on the phone and you could talk to him; is that correct?

[42] A. I could talk to his office.

Q. But you were——

A. (interposing) I am not sure I could talk to him.

Q. But you also testified that you never in fact did that?

A. Exactly.

Q. Could you describe the boundaries of the 2nd District in 1980?

A. No.

Q. What state legislative district are you a resident of, state house of representatives?

Mr. Everett: I am going to object to that question. If you mean single member, it is a multi-member district. I don't know what you are——

Ms. Cunningham: (interposing) I don't mean. I am just asking her what the boundaries—whether she knows what the boundaries are and whether she can describe them.

The Witness: No, because they have changed a lot in the last few years. At one point Durham was made up of three districts. And I am just not sure what the district is now.

By Ms. Cunningham:

Q. Were you aware in the '80s what the district was?

A. Yes.

Q. What were the boundaries in the district then?

[43] A. I don't know. I would have to see the map of Durham.

Q. Do you know what state senate district you are a resident of?

A. No.

Q. Did you know what the state senate district was in the '80s?

A. When I saw the precinct maps and the maps of Durham, I would.

Q. But not just offhand?

A. No.

Q. You couldn't just say what neighborhoods it comprised or what areas of the city?

A. I couldn't say.

Q. What about county commission? Do you know what county commission district you are a resident of?

A. They aren't named. It is a general election of the whole county.

Q. I see. The county commission is elected at large?

A. Exactly.

Q. What about city council? Is the city council elected at large?

A. Well, yes, it is elected at large, but they are representatives of wards.

Q. So in other words——

[44] A. (interposing) Six of them.

Q. Let me finish my question just so you know what I am asking you. The representative must live within a certain area, but the entire city votes on the representative?

A. Yes.

Q. Is that how it works?

A. Yes.

Q. And that is in Durham. Do you know what school board you are, what—are your school boards elected by district?

A. Yes.

Q. Do you know what school board you are a resident of—school board district?

A. No.

Q. You don't know the boundaries?

A. No.

Q. You don't know what neighborhoods comprise it?

A. No.

Q. For any of the districts that I have just named, do you know what the racial percentage of the district is?

A. Of what district? Say it again, please.

Q. I will make it more simple. Do you know what the racial percentage of the general assembly district that you live in is?

A. I do not know.

. . . .

EXCERPTS FROM DEPOSITION OF MELVIN G. SHIMM

October 27, 1993

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[6] By Mr. Speas:

Q. State your name for the record, please.

A. Excuse me?

Q. State your name for the record, please.

A. Melvin G. Shimm.

Q. And you are a professor at Duke University Law School?

A. That is right.

Q. How long have you served on the faculty of Duke Law School?

A. 40 years.

Q. What are your present teaching responsibilities?

A. I teach largely in the commercial law area, bankruptcy, and I teach a seminar in medical, legal and ethical problems.

Q. What is your current home address?

A. 2429 Wrightwood Avenue—that is one word, W-r-i-g-h-t-w-o-o-d—Durham, 27705-5823.

Q. How long have you resided there?

[7] A. Since 1959, which would be 34 years.

Q. Which congressional district do you reside in?

A. The 12th.

Q. Do you know who your congressman is?

A. Yes.

Q. Have you had any contact with his office?

A. No.

Q. Which district did you reside in before the present redistricting plan was established?

A. The 2nd.

Q. Do you know who your congressman was then?

A. Yes, Tim Valentine.

Q. Did you have any contact with Congressman Valentine's office?

A. Yes, I did.

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EXCERPTS FROM DEPOSITION OF JOHN D. MERRITT

December 22, 1993

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[21] Q. Then what transpired, and did you play a part in developing some alternative?

A. Yes, that is correct. We met with an organization called the National Committee for an Effective Congress, NCEC, and drafted some sample plans that could be proposed to the legislature that would accomplish a two minority member district.

Q. Who and what is this NCEC?

A. It is a national organization that is a political group that mainly supports Democratic members of Congress and the sustaining of a Democratic majority in the Congress.

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Q. With respect to technology, to what extent does that organization have computer facilities that might be useful in drawing a plan?

A. Very useful, very high quality individuals who operate very high technologically significant systems.

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[22] Q. What were some of the plans that you considered? Can you just sort of take us through what took place with the NCEC?

A. I think the first objective was you had to see whether there were enough voting age population minority individuals in the state of North Carolina for it to be possible to create two minority districts, and that in itself is not an easy task because minorities in North Carolina do not all live together in one or two neighborhoods.

Q. They are pretty much dispersed?

A. Very dispersed across the country. And you know, one could have individually by household tried to identify all the blacks and move them into a district, but that would have been foolish and there had been no commonality of interests between the districts that would be drawn in that regard.

So by looking at where the population centers were and then—obviously Charlotte had a large population base, Durham had a large population base, Wilmington has a significant, Fayetteville. Then out of using the beginning position, because drawing one was no problem obviously, because the legislature had already done that, you try to start putting together options that would possibly create two minority districts.

Q. When you were putting together options, did that [23] take the form of actually having plans drawn out and looking at them, that type thing?

A. More done on a computer terminal.

Q. When this was being done, were you present during much of that?

A. Correct.

Q. Now, with respect to the process as it developed, how did you evaluate the different plans that were being drawn out on the computer?

A. Through the miracle of technology and a spreadsheet, every change you made—every change that was made in any line, every precinct that was moved, would instantly give the Democratic performance index the last vote for the governor and the president and the senator in each one of those subjurisdictions all the way down to the smallest political entity, including all the way down to the precinct level—not quite to the numeration district census block level, but at least to the precinct level.

And to the extent that they matched up with smaller geographic units of the census, that would be consistent.

Q. Now, did you have the racial—was the racial composition also——

A. (interposing) Very similar system to the one the legislature used for generating its public data base that was used by individuals wishing to comment on the plans that the [24] state put forward.

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Q. As these plans were evolved, who was present from Capitol Hill—that is, either staffs and congressmen, other than yourself?

A. Mr. McCuen, McCuen representing Mr. Hefner, Mr. Conti representing Mr. Price, Mr. Nagy representing Mr. Valentine were all in and out over this weekend that this work was being kind of flight tested to see if we could come up with something.

• • • •

Q. Now, with respect to the demographics like income, family structure, things of that sort, was that sort of material available to you in the drawing process, or do you remember that?

A. This was two years ago and you know, there have [25] been four iterations of the census data base, STS I, II, III, and IV, I think, has just come out this week. I don't believe that the information on household income other than at the state level was available at the time we were doing this.

Q. Now, you looked—would it be fair to say that you looked at any number of different alternatives in moving different things around?

A. Correct.

Q. And you finally came up with a proposal; is that correct?

A. Well, I had some amount of help in this, too, as during the process immediately prior to doing this, an individual member of the legislature gave Mr. Rose a call and said there was a plan floating around the legislature that had supposedly been to the Justice Department and had been received with some favorability down there.

And this plan became known as Optima II or Optima I, which is a plan that supposedly had originated with Mr. David Balmer, a member of the legislature from—a Republican member of the legislature.

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[72] Q. Can you tell me what the Democratic performance index is? You spoke of that as a number that appeared on your screen, I guess while you were drawing this plan. What does that mean?

A. A simple description would be that as you amalgamate different races and look at gubernatorial, lieutenant gubernatorial, attorney general, senate, presidential races in a given precinct over a given period of time that a different candidate for Congress who either performs at a negative to an average index or a positive to an average index should have a Democratic performance index of "X."

So you have to look at the amalgamation of all the numbers and then does the congressman in that region generally tend to perform in the high end of that or the low end of that and it gives you some indicator. It is a very imprecise science.

Q. And yet it is something that you referred to while you were making up your plans?

A. Correct.

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[73] Q. And if I understood you correctly, you told Judge Everett that when you put this plan together you did not have access, in fact no one had access, to demographic information like household income?

A. No, sir.

Q. But you did have access to race, age, voter registration, and this Democratic performance index?

A. Correct.

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EXCERPTS FROM DEPOSITION OF DENNIS JAY WINNER

January 11, 1994

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[6] Q. Senator Winner, would you state your—well, first, by way of explanation, I think you are already aware of this, I am a plaintiff and attorney for the plaintiffs. And this is a deposition, and I will be asking questions. If they are not clear, please let me know and I will try to clarify them.

And with that preface, let me just start off by asking you your name, residence, occupation.

A. My name is Dennis Jay Winner. I am an attorney. My residence is 117 Sondley Place, Asheville, North Carolina. I hope that answers everything.

Q. How long have you been an attorney, and you might just give us——

A. (interposing) I was licensed to practice law in the fall of 1966 and have practiced ever since then except for four years and eight months when I was a judge.

Q. That was in the 1970s?

A. That was from December 1970 until July 1975.

Q. And how long have you served in the state General [7] Assembly?

A. Since 1983.

Q. Has that always been as a senator, or were you in the other house as well?

A. No, that was always as a senator.

Q. When you began serving, had the redistricting after the 1980 census already been completed?

A. It had. Well, the initial redistricting had. There was—the *Gingles* decision caused some more redistricting

to be done to the General Assembly after I was there, though I took no part in it other than to vote for the bill. It was while I was a freshman senator. But the congressional redistricting, which I understand this lawsuit is about, had been completed before I was there.

Q. Did there come a time when you became aware that a new round of redistricting was in prospect?

A. Well, I guess I always knew that.

Q. And you learned that North Carolina would have an additional congressmember?

A. Yes.

Q. Were you assigned any special role with respect to redistricting?

A. I was appointed chairman of the redistricting committee in the Senate, which was in charge of all of the redistricting from the Senate side of it.

[8] Q. Was there any co-chair or were you the sole——

A. (interposing) I was the sole chair.

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[11] Sometime—the first thing I can recall doing was that I thought that we ought to try to get the views of the various congressmen about their own districts. And so I went to Washington, I believe with Russell Walker. I really can't remember for sure. But that was sometime in the early spring, probably in late March or early April, and met with as many of them who wanted to meet with me. That was not all of them, but it was almost all of them. In fact, I think I met with all of them except for Congressman Taylor and Congressman Jones.

The next thing I recall after that—and we also [12] had these public hearings about redistricting in general in various parts of the state. The next thing I remember

after that is that I drew—this, again, was before anything was on a computer—using the census book, sort of a sketch of an idea of a plan. And in fact, I must have done that before I went to Washington because I can remember showing that early sketch to some of the congressmen and seeing what they thought of it. They were pretty much critical of it, as I recall.

Q. Did you meet with them en masse or just individually or how did—do you have any recollection in that regard?

A. I met with the Democrats separate from the Republicans. I remember meeting with the three Republicans and one staff member from Congressman Taylor together. And I think we met with the Democrats together, but I am not totally sure of that. I believe we did. I have some faint memory. The meeting was not very—the meetings were not very productive, so they are not very firm in my mind.

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[13] Let me go back a minute, because I think that something needs to be explained. One of the things I learned about redistricting in general from a chairman's point of view is that at no time in politics do I know of are you faced with work that requires a greater ability to achieve compromise than you do with redistricting, because you have a lot of competing forces.

And for instance, with the Senate plan, which I think I had a lot more to do with than I did with the [14] congressional plan—with the Senate plan, even though I am the one who drew it and got it through all the way, I doubt there is a district in the whole plan that I would draw if it were just me deciding it the way they ended up. It was—the whole way you do this is to negotiate compromise, put ideas--I felt like a mediator most of the time between competing interests.

And the same was true with the congressional plan except that you had the additional—it was easier in a way because the people were not interested as much as they were in their own seats. But also it was more difficult in a way because it wasn't just one house deciding this. It was two houses.

So when we agreed to the Congressio... Base 1, I was pretty confident that I could get that through the Senate. Then the House committee met and rejected it and came back with something else. And from then on until the end--until we finally passed something, it was just a question of trying to negotiate things that different competing sides could live with.

• • • •

[16] Q. Okay. Now, that basically takes us up through the first plan, then. You said that after the initial plan, Congressional Plan 1, was not accepted by the House committee, there was a variety of plans and ultimately a single—a plan emerged with a single majority minority district. Then what happened after that? Can you tell us what took place?

A. Well, I recall sometime that fall going to Washington and meeting with the Justice Department, though I don't remember in that first meeting that we had with them—with some of the staff people—very much about the congressional plan. Most of it—most of what I was dealing with was the Senate plan.

And also in the fall I had two or three very lengthy conversations with some lady on that Justice Department staff whose name I have forgotten, but those [17] conversations were solely, as I recall it, about the Senate plan. I don't remember ever having a conversation with the Justice Department about the congressional plan until we went up there the day before they rejected it.

Shortly before that meeting, I got a call—I presume from Gerry Cohen, I am not absolutely certain of that, but from somebody—saying that the Justice Department wanted to meet with us again and could I go. And I arranged my law schedule so I could and went up there. At that meeting I think Speaker Blue was there and Leslie was there and Gerry Cohen was there and I believe Toby Fitch was there. I think he was the only House chairman there, if I remember correctly.

That meeting—I could not figure out the purpose of that meeting once we got into it, because it was very obvious to me—that was the first time I met John Dunne, or whatever his name is. And it was very obvious to me that Mr. Dunne had already made his mind up, and why he dragged us to Washington I don't know.

They talked about the Senate and the House plan—you know, out of an hour or two hour meeting maybe we spent five minutes on the legislative plans. Most of it had to do with the congressional plan. And Mr. Dunne did most of the talking—there was a little talking from the other staff, but did most of the talking, and most of it got down to sort of [18] that we ought to have a quota system with respect to minority seats. You had 22 percent blacks in this state. Therefore, you ought to have as close to that as you could have of congressional districts. That is really all I remember about it.

Q. Have you heard the phrase "if you can, you must" used with respect to the creation of majority minority districts or something——

A. (interposing) Yes, I have heard it. Most of—the person who most used that phrase during this whole process that I can recall is Senator Leo Daughtry. Throughout the whole process, both in the Senate and the congressional redistricting, he was very interested in forming as many minority districts as he could create and then so-called minority interest districts and any

other way he could figure out to compact as many Democrats together as he could.

Q. With respect to Mr. Dunne's remarks, was it your view those would be consistent with an "if you can, you must" approach?

A. I don't remember him ever saying that, but he may well have.

Q. In substance, would it be—was his approach——

A. (interposing) I think his substance was really that you had—if you had 22 percent blacks in North Carolina, then you ought to have 22 percent minority congressional [19] seats. Whatever shape didn't matter.

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[21] After I got through—after we got through doing the Senate plan, and nobody ever thought of—even though I thought the Justice Department's ruling on the Senate plan was absurd, nobody—nobody that I know of was interested in [22] going and filing any lawsuit to get our original plan approved over that.

So we tried to come up with a plan that would comply with their objection, and that took some time because it did affect a lot of eastern North Carolina senators in coming up with a consensus on that. And that is where I was focused, and I got that done and then turned to the congressional plan.

After a lot of thought about this and talking to various lawyers with the legislature involved in it, I had come to the conclusion that we ought to go to court and expressed that on several occasions to Senator Barnes. But it was the—but I realized that it was going to take both houses to do that, like it takes both houses to make any decision down there, and that ultimately the leadership in both houses were going to have to decide it. Somewhere along the way, the decision was made

that we weren't going to go to court and we were going to try to comply with the plan.

At that time, I had at least two that I can recall and perhaps three conversations with Senator Barnes about resigning from being chairman of the committee. He was—he expressed, at least, to me that he was—that he had become convinced that the odds were so slim of us winning this in the District Court of the District of Columbia that he just felt like we had to comply. He didn't want to tie up the [23] State in litigation for several years over it.

Finally, partly out of loyalty to him and partly because I knew that if I took the other side in this and fought it that I was going to tear the General Assembly up and that we were going to be there for a long time and one of the things that was important was to try to make some kind of decision in time to have this election—that was a factor, trying not to put the election off—so I decided that I needed to go on and just do the best I could with the job I was given and put my personal views aside. And that is what I did.

• • • •

[24] The other two changes I made was, one, there got to be a controversy between Senate members who were big supporters of Congressman Valentine and with the House leadership on the 2nd—the line between the 2nd and the 4th [25] Congressional District, and I was able to work out a compromise of that. And then there was a controversy among the mountain Democrats over where the 11th and 10th Congressional lines should be, and I was able to work a compromise out of that.

And the only other thing I remember doing with that plan was that the House had—in their plan had taken 90 percent of Congressman Ballenger's home county away from him, which I thought was a ridiculous thing to do,

and I got that changed, so that all of Catawba County stayed—or all or most of it, I don't remember exactly—stayed with him and wasn't taken out of his district. That really is my best memory of it. And then I just led it through the floor. And that was the extent of my knowledge of this plan.

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[31] Q. "I think that the Bush administration has, for reasons which I will—will put reason on them later in this talk, has forced us to do things that the Voting Rights Act does not require and which are bad for the state but from which, on talking to the expert lawyers in the field, we [32] have no practical remedy."

Was that your view at the time?

A. That was my view.

Q. And it was your—when you spoke of the Bush administration, was that basically the Department of Justice and Mr. Dunne that you were referring to?

A. Well, as it appears later in the speech, I was convinced that it was not a civil rights decision that was made by the Justice Department, but a political one. And I presume that is why Mr. Dunne was put in that position, which I understand is a politically appointed position rather than a civil service type position.

Q. And basically what was that political decision, if you could summarize it?

A. Well, I believe that it was—that the decision was made—and I have no basis for this other than rumor and logic. I believe the decision was made that the Republicans could do better than our original plan if the state was forced to put in another minority district and that that was why the decision was made and that I still believe that, and I think it had that effect.

Q. You mean, the state was being required to have two majority minority districts because of some supposed political advantage on the part of those who were imposing the requirement?

[33] A. That was my view.

Q. But in any event, you did feel at all times—well, after the objection to preclearance was interposed, you believed at all times that the Justice Department was firm in requiring that there be two majority minority districts?

A. There wasn't any question about that.

• • • •

[37] Q. Do you have any opinion as to why the second district was created—the second majority minority district was created in the western part of the state instead of in the southeast?

A. Although I didn't make that decision, I do have an opinion, yes.

Q. And what is that opinion, sir?

A. In comparing the two, it is very clear to me that the district—that some configuration of an I-85 district and the district that we in fact adopted is more—though it is maybe more peculiar looking, it is clearly more compact than any drawing of a district in south central and southeast North Carolina for the following reasons. And I am comparing it to this idea of Charlotte to Wilmington type district.

One, there is clearly more of a community of interests in that most of the people in the district that we passed are urban, where you had a real mixture of urban and [38] rural in the district that was looked at from Charlotte to Wilmington.

Secondly, it is in driving time at least an hour shorter from Charlotte to Durham than it is from Charlotte to Wilmington. Thirdly, I think my sense of the demographics of the state are that there are distinctions between piedmont and rural eastern people, not just urban-rural distinctions, but just eastern-piedmont distinctions. And that district, of course, was—Wilmington to Charlotte is half east, half piedmont, where the district that we passed is all piedmont.

There are—that Charlotte to Wilmington district would be in five different media areas compared to three of Charlotte to Durham, therefore making it far more expensive to campaign in. Those are the reasons that come to the top of my head.

Q. Do you know whether or not protection of incumbents was another factor that spoke in favor of the I-85 district?

A. No, it clearly didn't because, although I didn't work on it, I was aware that one of the other senators and the staff had used a Charlotte to Wilmington district that was just—that protected incumbents just as well as the one that we passed.

Q. All right. I would like to ask you some questions about things that affected your decision personally to vote [39] for this plan as we now have it. At the time that you voted for the plan, did you think that two majority minority districts were necessary to comply with the requirements of Section 5 of Voting Rights Act?

A. No, although I am not—don't claim to be an expert on the Voting Rights Act, but my sense of what was intended—other than getting impediments of actual voting out of the way, but with respect to legislative and congressional districts—my sense of what was intended was that Congress correctly intended that legislatures should not submerge concentrations of minorities in multimember districts or fracture them in some way

when they had a natural majority of the population, and which probably was clear—was probably done throughout the south before that act was passed.

On the other hand, I don't think it was ever intended to take one little group here (indicating) and connect it by a road or a phone line or just area to some other little group there (indicating) in order to create majorities in which there were not concentrations of minorities. And that is why I don't think it was required. I don't think that—my personal view is that I don't think that the Voting Rights Act requires either—any minority congressional districts in this state.

Q. So I assume, then, that you don't think that this [40] was required in order to satisfy Section 2 of the Voting Rights Act either?

A. I do not—in my limited expertise, given the caveat that I gave you—I am not a civil rights law expert—I don't think it is what Congress intended.

Q. At the time did you feel that the passage of a plan with two majority minority districts was necessary to redress historical discrimination against minorities in this state?

A. Only if you could—only if you can create reasonably compact districts, which I don't think that can be done, although I would say that I think that the 12th District that was created is probably a lot more compact than the 1st District that was created.

Q. Why do you say that?

A. Because it is smaller, easier to get across, has more of a community of interest, is less irregular. I think the 1st District is far more irregular than the 12th District. You know, the 12th District has gotten all the heat because it is narrow. It is smaller than my congressional district was in the '80s plan or ever has been in my lifetime. That is why.

• • • •

[58] By Mr. Stein:

Q. I have a few, kind of some general questions to you as a legislator going to Raleigh from a district to engage in redistricting. You said that particularly your role in dealing with the Senate redistricting was one of the [59] hardest jobs you had had and that that there were all these competing interests. What sorts of interests were competing?

A. Well, of course, the biggest interest in the Senate plan and in the congressional plan were people trying to save their own skins, you know. Everybody wanted to have a safe district.

And if you—if you took and made one district safe, you made the next one more unsafe, and then—and nobody, and this includes me, wanted to bring in new territory. I mean, who wants to have to go campaign in some place you never campaigned before? It takes a lot of effort.

Then there were partisan interests and there were other—and there were interests of minorities in being able to enlarge their numbers in the General Assembly. That is really pretty much it.

• • • •

[71] Q. I think you said that you mediated the dispute as to where the line would go between the 4th and the 2nd?

A. Well, I was more than a mediator of that. I was sort of—and I do not remember all the detail of this, but let me just tell you what I remember about it. The House conception, if I recall correctly, included all or part of Franklin County nad [sic] the part of Johnston County that Congressman Valentine already—already represent-

ed, Johnston County being a divided county in the '80s redistricting, into Congressman Price's district.

There was clear resistance to that among some of the senators, without saying who, so I don't violate their immunity. So I proposed a plan where all of Franklin County, if I remember correctly, and the part of Johnston County that Congressman Valentine represented and some more of it would be in his district. And that got into dispute between me and one of the leaders of the House, without violating that person's immunity.

Under either version, both—I mean, you were going to end up with some split up counties that it suddenly—I remember I was driving back to Raleigh and it suddenly occurred to me there was a solution to this in which you would—which ought to be a compromise between the competing [72] interests of the two congressmen which would make the 4th District into a really compact, nice district. And I couldn't figure out why I hadn't thought of it before.

And I went and proposed it to whomever it was that this dispute was going on with, and within just a few hours they accepted that and that was the end of the dispute. That is what we ended up with. That is the line that is currently there.

Q. And originally the dispute was between folks in the House that were trying to protect what they perceived to be either their interest or Congressman Price's interest in the configuration of the 4th and senators who had some allegiance to Congressman Valentine?

A. I think that is a correct statement. There was also some part of it of senators, I think, who didn't want their county divided. Of course, you hit that in every kind of dispute there was over this.

• • • •

[75] Q. You testified earlier this morning that sometimes it is necessary to have noncompact districts, that in fact you have lived in one for some time. What other circumstances or what circumstances create the necessity for noncompact districts?

A. Well, of course, the biggest necessity is that there is not enough population to have a compact district. I mean, that is the case in my end of the state. You are going to have to—and it is the case in the northeast. I think you have to have very large, cumbersome geographical districts because there is no people there.

Q. And isn't it also so in your part of the state that that problem is compounded by the fact that it is mountainous and even more difficult to get from one place to another?

A. No question about it. My old district in the '80s when you had to go from Avery County, which was the eastern line, to Cherokee County is a minimum of a four hour drive. That is a very cumbersome district to—or it would be in my view to try to represent that.

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Nos. 94-923, 94-924

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

RUTH O. SHAW, *et al.*,
Appellants,
v.
JAMES B. HUNT, JR., in his official capacity
as Governor of the State of North Carolina, *et al.*,
Defendant-Appellees.

JAMES ARTHUR POPE, *et al.*,
Plaintiff-Intervenors Appellants,
v.
JAMES B. HUNT, JR., in his official capacity
as Governor of the State of North Carolina, *et al.*,
Defendant-Appellees.

On Appeal From The United States District Court
For The Eastern District of North Carolina

BRIEF OF APPELLANTS SHAW, *ET AL.*, ON THE MERITS

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42 pp

QUESTIONS PRESENTED

I

Was North Carolina's racially gerrymandered redistricting plan enacted without a compelling state interest for doing so?

II

Did the General Assembly enact North Carolina's racially gerrymandered redistricting plan without narrowly tailoring it?

III

Did the court below negate the "strict scrutiny" test by misallocating the burden of persuasion, relying on post hoc rationalizations, and making clearly erroneous findings of fact?

THE PARTIES

Plaintiff-Appellants are:
RUTH O. SHAW, MELVIN G. SHIMM, ROBINSON O. EVERETT, JAMES M. EVERETT, and DOROTHY BULLOCK.

Plaintiff-Intervenors are:
JAMES ARTHUR "ART" POPE, BETTY S. JUSTICE, DORIS LAIL, JOYCE LAWING, NAT SWANSON, RICK WOODRUFF, J. RALPH HIXON, AUDREY McBANE, SIM A. DELAPP, JR., RICHARD S. SAHLIE, and JACK HAWKE, Individually.

Defendant-Appellees are:
JAMES M. HUNT, JR., in his official capacity as Governor of the State of North Carolina; DENNIS A. WICKER, in his official capacity as Lieutenant governor of the State of North Carolina, and President of the Senate; DANIEL T. BLUE, JR., in his official capacity as Speaker of the North Carolina House of Representatives; RUFUS L. EDMISTEN, in his official capacity of Secretary of the State of North Carolina; THE NORTH CAROLINA STATE BOARD OF ELECTIONS, an official agency of the State of North Carolina; EDWARD J. HIGH, in his official capacity as Chairman of the North Carolina State Board of Elections; JEAN H. NELSON, in her official capacity as a member of the North Carolina State Board of Elections; LARRY LEAKE, in his official capacity as a member of the North Carolina State Board of Elections; DOROTHY PRESSER, in her official capacity as a member of the North Carolina State Board of Elections; and JUNE K. YOUNGBLOOD, in her official capacity as a member of the North Carolina State Board of Elections.

Defendant-Intervenor Appellees are:
RALPH GINGLES, VIRGINIA NEWELL, GEORGE SIMKINS, N.A. SMITH, RON LEEPER, ALFRED SMALLWOOD, DR. OSCAR BLANKS, REVEREND DAVID MOORE, ROBERT L. DAVIS, C.R. WARD, JERRY B. ADAMS, JAN VALDER, BERNARD OFFERMAN, JENNIFER McGOVERN, CHARLES LAMBETH, ELLEN EMERSON, LAVONIA ALLISON, GEORGE KNIGHT, LETO COPELEY, WOODY CONNETTE, ROBERTA WADDLE, and WILLIAM M. HODGES.

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No. 94-923

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Defendant-Appellees.

On Appeal From The United States District Court
For The Eastern District of North Carolina

BRIEF OF APPELLANTS SHAW, *ET AL.*, ON THE MERITS

OPINIONS BELOW

Upon remand from this Court, the three-judge district court rendered majority and minority opinions which, as amended on August 22, 1994, are reported at 861 F.Supp. 408 (E.D.N.C. 1994) and are also reported in the Appendix to the Jurisdictional Statements (hereinafter "App. J.S.") at pp. 6a-154a.[1]

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[1]The Joint Appendix is cited as J.A.

JURISDICTION

The district court entered judgment against Appellants on August 1, 1994, and at the same time a majority opinion was filed, as well as the dissenting opinion of Chief Judge Voorhees. On August 15, 1994, Plaintiff-appellants filed a Motion to Amend and Add Findings Pursuant to Rule 52(b) of the Federal Rules of Civil Procedure. On August 22, 1994, amended opinions were filed by the majority and the dissenting judge in the district court. App. J.S. 6a-154a. On August 29, 1994, Plaintiff-appellants filed a Notice of Appeal. App. J.S. 157a. On September 1, 1994, the district court denied Plaintiffs' 52(b) Motion by divided vote. App. J.S. 155a-156a; and on September 15, 1994, the Plaintiff-appellants filed a Supplemental Notice of Appeal. App. J.S. 159a. Subsequently, pursuant to Rule 22 of the Rules of the Supreme Court, the Plaintiffs and Plaintiff-intervenors filed a Motion Applying For The Determination that the time for docketing the appeals in this case, together with the consolidated single appendix to the jurisdictional statements of Plaintiffs and Plaintiff-intervenors, run to and include November 21, 1994. This Motion was granted by the Chief Justice. Thereafter the Jurisdictional Statements of the Plaintiffs and Plaintiff-intervenors were duly filed on November 21, 1994. Probable jurisdiction was noted on June 29, 1995, 115 S.Ct. 2639. This Court's jurisdiction is invoked under 28 U.S.C. §1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution which provides, "No State shall...deny to any

person within its jurisdiction the equal protection of the laws."

This appeal also involves Sections 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 and § 1973c. The text of these statutes is set forth in the Appendix to the Jurisdictional Statement of Plaintiff-appellants.

STATEMENT OF THE CASE

A. Proceedings Below

On March 28, 1992, Plaintiff-appellants filed their action against both State and Federal officials to challenge the North Carolina congressional redistricting plan that had been enacted by the General Assembly on January 25, 1992, after an earlier plan had been denied preclearance by the Attorney General pursuant to § 5 of the Voting Rights Act. *See* 42 U.S.C. § 1973c. They claimed that the plan is an unconstitutional racial gerrymander which violates the Equal Protection Clause of the Fourteenth Amendment, the Fifteenth Amendment, and other Constitutional provisions. In their complaint, the Plaintiff-appellants -- who are five white residents of Durham County, North Carolina, registered to vote in that county -- alleged that the General Assembly decided to "create two congressional districts in which a majority of black voters was concentrated arbitrarily -- without regard to any other considerations, such as compactness, contiguousness, geographical boundaries, or political subdivisions,...with the purpose... to create congressional districts along racial lines, and to assure that black members of Congress would be elected from two congressional districts in which a majority of black voters were intentionally and purposefully

concentrated on the basis of census data reflecting the racial composition of North Carolina's population."

The three-judge district court dismissed the action as to all the Defendants, with Chief Judge Voorhees dissenting as to the dismissal of the State Defendants. In turn, the Plaintiff-appellants appealed to this Court, which on December 7, 1992 noted probable jurisdiction and subsequently heard oral argument on April 20, 1993. At that time counsel for the State-appellee began his argument in this manner:[2]

> This case is about the legal significance of two facts. First, the North Carolina General Assembly intentionally created two majority-minority congressional districts. Second, the General Assembly did so for the purpose of complying with § 5 of the Voting Rights Act and of securing preclearance of its congressional reapportionment plan from the Attorney General of the United States.

On June 28, 1993, this Court decided that Plaintiff-appellants had stated a claim under the Equal Protection Clause by alleging that the General Assembly had adopted a redistricting plan "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the

[2]1993 WL 751836 (Oral Argument at page 26). Subsequently, in responding to a question from the Court, counsel stated: "There's no dispute here over what the State's purpose is. There's a dispute over how to characterize it legally, but we're not in disagreement over what the State legislature was trying to do." *Id.* at 38.

separation lacks sufficient justification." *Shaw v. Reno* (hereinafter *Shaw*), ___ U. S. __, 113 S. Ct. 2816, 2832 (1993).[3] In reversing and remanding, the Court ruled that if the Plaintiffs' "allegation of racial gerrymandering remains uncontradicted," the trial court "further must determine whether the North Carolina plan is narrowly tailored to further a compelling governmental interest." 113 S. Ct. at 2832.

Upon remand -- and despite the position taken by the State during the oral argument before this Court -- the Defendant-appellees denied that the redistricting plan was a "racial gerrymander" subject to strict scrutiny. Alternatively, they asserted that even if subject to strict scrutiny, the plan complied with the Equal Protection Clause because it was "narrowly tailored" to further the State's "compelling interests." According to the answer, the "compelling interests" were obtaining preclearance under § 5 of the Voting Rights Act, avoiding a violation of § 2, and eradicating the effects of past racial discrimination.

After the answer was filed, the district court allowed 22 persons to intervene as defendants in support of the plan and then permitted 11 persons to intervene on Plaintiffs' side. After some four months of discovery, and denial of a motion by Plaintiffs and Plaintiff-intervenors for injunctive relief, the court proceeded to trial on March 28, 1994. After a six-day trial and the consideration of

[3]This Court affirmed dismissal of the claims against the two Federal Defendants and expressed no view as to the Plaintiffs' claims against the State Defendants under Art. I § 2; Art. I § 4; the Privileges and Immunities Clause of the Fourteenth Amendment; and the Fifteenth Amendment. 113 S. Ct. at 2832.

extensive oral and documentary evidence the court finally rendered its judgment, from which Plaintiffs and Plaintiff-intervenors appealed. The opinions rendered by the majority and by the dissenting judge are discussed hereinafter in the argument.

B. Statement of Facts

As a result of the 1990 Census, North Carolina became entitled to an additional representative in the Congress. In each House of the General Assembly, a committee was entrusted with the task of preparing a redistricting plan for electing members of Congress, as well as reapportionment plans for the legislature itself. These committees conducted many public hearings and, on April 17, 1991, adopted these five redistricting criteria for seats in Congress: (1) equal population; (2) compliance with the Voting Rights Act and the Fourteenth and Fifteenth Amendments; (3) single-member districts consisting of contiguous territory; (4) retaining the integrity of precincts; and (5) not dividing census blocks. J.A. 49-50. Neither "compactness" nor "community of interest" was prescribed as a standard for redistricting.[4]

In July 1991, the North Carolina General Assembly enacted a redistricting plan which included one district, the First, in which African-Americans were a majority of the population, the voting age population, and the registered voters. 1991 N.C. Sess. Laws, Ch. 601. This "majority-minority district" was located in the northeastern

[4]Although the software available to the General Assembly had a program to measure "compactness," it was never used in the redistricting process. Newkirk Dep. at 22-24; Cohen Tr. 588-89.

part of the state, and it also extended further west to include concentrations of African-Americans in Durham.[5] This redistricting plan -- which received the favorable vote of all the black legislators, Stip. 56-60; J.A. 53 -- was transmitted to the Department of Justice for preclearance.

Subsequently, the Democratic leadership of the General Assembly submitted to the Department of Justice a memorandum dated October 14, 1991, which detailed the virtues of the enacted plan and the disadvantages of other proposed plans. Stip. Ex. 25; J.A. 94-138. One such disadvantage was the lack of "compactness" in alternative plans and the resulting barrier to fair representation. *See* e.g. *Id.* at 34, 66; J.A. 109, 129. Among the members of the Democratic leadership in whose behalf the memorandum was submitted were two African-Americans. One was Dan Blue, who was Speaker of the North Carolina House of Representatives and, indeed, only the fourth black who had held such a position in this country since the Civil War. The other was Milton F. "Toby" Fitch, Jr., a Co-chair of the House Redistricting Committee.

On December 17, 1991, Speaker Blue and Representative Fitch were part of a small group invited to meet in Washington with John Dunne, Assistant Attorney

[5]The court below used the term "majority-minority district" to refer to an electoral district in which a majority of both the registered voters and the voting age population are members of the same racial minority. App. J.S. 8a, n. 3; 861 F. Supp. 408, 417, n. 3. In that usage, the term would not include a district in which African-Americans constituted only a plurality; such a district could be created in the southeastern part of North Carolina by including the large concentration of Native-Americans in Robeson County.

General for the Civil Rights Division.[6] Senator Dennis Winner, the Chairman of the Senate Redistricting Committee, was present; and he later described the meeting to his fellow senators in this manner:[7]

> And I could not figure out why they called us up there and don't understand that to this day. And Mr. Dunne, some of the staff asked a question or two or said -- made an occasional comment, Mr. Dunne did most of the talking. The essence of what he said at that meeting was -- and he said this in different ways over, and over, and over again -- you have twenty-two percent black people in this State, you must have as close to twenty-two percent black Congressmen,

[6]Assistant Attorney General John Dunne, one of the two federal officials who was dismissed as a defendant in this case, could not be deposed by Plaintiff-appellants because of claimed "deliberative process" privilege. However, his deposition in *Miller v. Johnson* (hereinafter *Miller*), 115 S.Ct. 2475 (1995) apparently indicated that he was a significant participant in the events giving rise to that litigation.

[7]See Daily Proceedings in the Senate Chamber for Friday, January 24, 1992, p.. 4; J.A. 281. At his pretrial deposition, Senator Winner waived his "legislative privilege" and testified that, at the Washington meeting on December 17, 1991, Assistant Attorney General John Dunne had told him and other representatives of the General Assembly that "we ought to have a quota system with respect to minority seats. You had 22 percent blacks in this state. Therefore, you ought to have as close to that as you could have of congressional districts." "That is really all I remember about it. . . I think his substance was really that you had -- if you had 22 percent blacks in North Carolina that you ought to have 22 percent minority congressional seats. Whatever shape didn't matter." Winner Dep. Jan 11, 1994, at 6, 10, 17-19.

> or black congressional districts in this State. Quotas.

On December 18, 1991 -- the day after the Washington meeting -- the Department of Justice denied preclearance of the congressional redistricting plan, as well as of the plan for reapportioning the North Carolina Senate and House. J.A. 147-54. The Attorney General's view, as stated in the objection letter, was that the General Assembly could have created a second majority-minority district in the southcentral to southeastern part of North Carolina, but failed to do so "for pretextual reasons." J.A. 153. Instead of challenging the Attorney General's objection by filing a declaratory judgment action in the United States District Court for the District of Columbia, the General Assembly decided to revise its redistricting plan to create two majority-black districts.

This task was not easy because in North Carolina, the voting age population is approximately 78% white, 20% black, 1% Native American, and the remaining 1% predominantly Asian. *See Shaw* 113 S.Ct. at 2820. Moreover, the black population is relatively dispersed, for blacks constitute a majority of the population in only five of the State's 100 counties. *Id.* Nonetheless, with the aid of computer technology, Gerry Cohen, Director of the Bill Drafting Division of the General Assembly, was able to devise a redistricting plan that satisfied the requirements of the Democratic majority leadership. App. J.S. 81a, n. 53; 861 F.Supp. at 458, n. 53.

The computer system used by Cohen and the General Assembly to prepare the redistricting plan was comprised of the 1990 census data at the census block level with respect to total population, voting age

population, population by race or national origin, and housing density. Moreover, as of November 1990, voter registration data by race and party was also merged into the system's database. Stips. 24, 25, 28, 32, 71; Tr. 531. However, the system contained in its database no demographic information as to income, education, type of employment, health care data, commuter patterns or any other type of economic, sociological or historical data. J.A. 48. Indeed, even though during the 1990 census the Census Bureau compiled other socioeconomic information besides population, age, race, and housing density, none of this information became available to the General Assembly until January 1993 -- a year after the second redistricting plan was adopted. Stip. 34.

The computer system used by the General Assembly in its 1991 and 1992 redistricting efforts permitted the operator to display on the computer screen geographic features, including basic map features, highways, streets, rivers, railroads, and political boundaries, and at the same time to display on the screen a report on the population, voting age population, and breakdown by race of the persons within a district or area then being displayed on the screen. Stips. 30, 34; Tr. 531; Newkirk Dep. at 11-12. Thus, by means of software used in conjunction with the computer system, the operator could create and display on the computer screen various combinations of the 229,000 census blocks into which North Carolina is divided and at the same time display a report on the population, voting age population, and distribution of those populations by race for each combination of census blocks. Tr. 540, 547.[8]

---

[8]*See* Timothy G. O'Rourke, *Shaw v. Reno: The Shape of Things to Come*, 26 RUTGERS L.J. 723, 746-48 (1995).

The map that was before the Court during the argument on April 20, 1993 portrays far better than any words the redistricting plan that resulted from the race-based manipulation of the General Assembly's computer. Nevertheless, this language from the majority opinion in *Shaw* is helpful in understanding the monstrosity that was created:

> The first of two majority-black districts contained in the revised plan, District 1, is somewhat hook shaped. Centered in the northeast portion of the State, it moves southward until it tapers to a narrow band; then, with finger-like extensions, it reaches far into the southern-most part of the State near the South Carolina border. District 1 has been compared to a "Rorschach ink-blot test," *Shaw v. Barr*, 808 F.Supp. 461, 476 (EDNC 1992) (Voorhees, C. J. , concurring in part and dissenting in part), and a "bug splattered on a windshield," Wall Street Journal, Feb. 4, 1992, p A14.
>
> The second majority-black district, District 12, is even more unusually shaped. It is approximately 160 miles long and, for much of its length, no wider than the I-85 corridor. It winds in snake-like fashion through tobacco country, financial centers, and manufacturing areas "until it gobbles in enough enclaves of black neighborhoods." *Shaw v. Barr*, supra, at 476-77 (Voorhees, C. J., concurring in part and dissenting in part). Northbound and southbound drivers on I-85 sometimes find themselves in

> separate districts in one county, only to "trade" districts when they enter the next county. Of the 10 counties through which District 12 passes, five are cut into three different districts; even towns are divided. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them. . .

113 S.Ct. at 2820-21.

Among the remarkable features of the North Carolina plan are these: (1) The serpentine, majority-black Twelfth Congressional District is the least geographically compact district in the United States; (2) the Twelfth District, and the majority-black First District, as well as two other districts, are among the 28 least geographically compact districts in the United States[9]; and (3) the plan's application of the concept of "contiguity" is "a drastic departure from previous redistricting practice."[10]

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[9]O'Rourke testimony Tr. 217; O'Rourke *supra* n. 8, at 761; Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts", and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH L. REV. 483, 554-65 (1993). Although three different standards of geographical compactness are generally recognized, the North Carolina districts are among the least geographically compact by any of these standards. *Id.*

[10]*See* O'Rourke *supra* n. 8, at 723, 758-60. In some instances, only "point contiguity" exists -- that is, portions of a district are interconnected only at an imaginary point. Moreover, the plan has at least four "double crossovers": Two districts have "point contiguity" at the same point. For example, no one can go from the northern to the southern portion of the First District without crossing the Third District, or from the eastern to the western portion of the Third

To achieve the plan's overriding purpose of creating two majority-black districts and assuring that two African-Americans would be elected to Congress,[11] some heavy concentrations of blacks in the major cities of the Twelfth District were "tied together with corridors with a requisite number of whites to meet the one-person, one-vote standard." Tr. 614 (Cohen Test.). Indeed, even though the announced criteria for redistricting called for retaining the integrity of precincts and for not dividing census blocks, Stip. 43, various predominantly white census blocks and precincts were split; but the majority-black precincts and census blocks were not split.[12]

District without crossing the First District. Cohen Dep. of November 23, 1993, 63-67; Tr. 212, 276-77; O'Rourke *supra* n. 8 at 723, 758-60. Contrary to the district court's view that these "double crossovers" meet requirements of "technical contiguity", Professor O'Rourke and other experts maintain that, under such circumstances, the districts involved "are simply not contiguous". *Id.* In that event, the General Assembly disregarded its own announced third redistricting criteria. Of course, from the language of the Statute, which enacted the second redistricting plan, it is virtually impossible to determine the location of any district boundaries -- much less the "contiguity" of a district. *See* 1991 N.C. Extra Sess. Laws Chapter 7, enacted January 24, 1992, which rewrote N.C.G.S. §163-201. App. J.S. 169a-240a.

[11]This purpose was alleged by Plaintiff-appellants in their Complaint, conceded by Defendants, and found by the district court *see* App. J.S. 7a, 108a, 110a. The supporting evidence is overwhelming (Tr. 111, 640, 1028, 1037, 1041, 1046-48). Moreover, this race-based purpose is not disputed by even Gerry Cohen, (Tr. p. 640) -- who operated the computer to prepare the plan and in whose testimony the district court placed great confidence. App. J.S. 81a, n. 53; 861 F. Supp. at 458, n. 53.

[12]Tr. 94-100, 106-07, 189-90 (Hofeller Test.); 496, 613-14 (Cohen Test.). At least one precinct was divided among three congressional districts -- which caused confusion among both election

Furthermore, in creating the two majority-black districts, the boundaries of Metropolitan Statistical Areas (MSA's) -- as defined by the Census Bureau -- were also ignored.[13]

The redistricting plan's reliance on "white corridors" to connect concentrations of African-Americans produced such results as these: (1) of Cumberland County's 274,556 residents, those included in the First District are primarily located in Fayetteville, and of that city's 75,928 population, 20,337 African-Americans and 5,940 whites are in the First District. Stip. 114, Exs. 1 & 7; Tr. 610-11 (Cohen Test.); (2) of Greenville's approximately 45,000 residents, 13,197 African-Americans, and 5,082 whites were placed in the First District. Tr. 611 (Cohen Test.); (3) of New Hanover County's population of 120,284, those included in the First District are for the most part residents of the seaport city of Wilmington; and of these city residents 15,369 are African-Americans and 4,660 are white. Stips. 101,102; Tr. pp. 605-08; and (4) in order to offset the removal of some black precincts in Winston-Salem which initially had been intended for inclusion in the Twelfth District, some concentrations of

officials and voters when the 1992 election took place. Pl. Ex. 104 (Stradley Affidavit).

[13]The majority-black Twelfth District splits three MSA's -- namely, Raleigh-Durham (the Research Triangle), Greensboro-High Point-Winston-Salem (the Triad), and Charlotte. Tr. 221-25. Both majority-black districts cross the boundaries of several television markets and newspaper circulation areas. As Chief Judge Voorhees pointed out, these circumstances "make fair representation impossible." *See* 861 F.Supp. at 493. If the majority in the district court was correct in disregarding such circumstances, *Id.* at 472, then geographical districts serve no function. *See* O'Rourke, *supra* n. 8 at 767-70.

African-Americans in the city of Gastonia were added to the Twelfth District by a narrow corridor connecting these "replacement" precincts to concentrations of African-Americans in Charlotte. Tr. 977. A disturbing aspect of the "bizarre" boundaries of North Carolina's two majority-black districts is that they not only reflect the General Assembly's overriding purpose to assure the election of African-Americans to Congress, but also a supplementary purpose to facilitate the election of *particular* black candidates to Congress.[14]

SUMMARY OF THE ARGUMENT

When the Court first considered this case more than two years ago, the State contended that the General Assembly had intentionally created two majority-black districts but was justified in doing so because this was necessary in order to obtain preclearance under § 5 of the Voting Rights Act. However, after the Court reversed the

[14]Thus, in creating the two majority-black districts, Gerry Cohen moved Vance County from another district to the First District in order to help the chances of Eva Clayton, who was then an announced African-American candidate for Congress. Tr. 590 (Cohen Test.). The boundaries of the sprawling First District were drawn in a way that would permit Toby Fitch and Thomas Hardaway, two African-American members of the General Assembly, to run for Congress from that district in the future. Tr. 591-92. Moreover, as Congressman Watt conceded, the substitution of black population concentrations in nearby Gastonia for some black precincts in Winston-Salem had the effect of enhancing the chances of an African-American candidate -- such as Congressman Watt -- from the Charlotte area. Tr. 977 (Watt Test.). Obviously, distrust of race-based redistricting is heightened when it appears that the candidacy of particular individuals has been specially favored by those preparing the redistricting plan. This favoritism for specific African-American candidates makes even clearer that the State's claims of "compelling interest" and "narrow tailoring" are far-fetched.

district court's dismissal of Plaintiff-appellants' action against the State defendants, the State took the position at trial that North Carolina's redistricting plan was not a racial gerrymander and that, in any event, it was justified by the State's "compelling interest" in complying with § 5 and § 2 of the Voting Rights Act and with remedying the effects of unconstitutional past racial discrimination.

On the basis of a concession by the State, the district court unanimously concluded that the State's plan was a "racial gerrymander." App. J.S. 110a, Conclusion 4; 861 F.Supp. at 473-74, Conclusion 4. This conclusion, as to which Appellees took no cross-appeal, should be binding on them. In any event, it is supported by overwhelming evidence -- including maps showing the "bizarre" appearance of the State's congressional districts, the legislative history of the plan, and testimony about the plan's extraordinary disregard of customary and traditional districting practices.

By divided vote, the district court ruled that the State had adequately established a "compelling interest" in enacting a race-based redistricting plan in order to comply with § 5 of the Voting Rights Act. In light of the remarkable similarity between the events that led to enactment of North Carolina's redistricting plan and the events that preceded enactment of the Georgia plan, *Miller* precludes the Appellees from relying now on a claimed interest of the General Assembly in complying with § 5.

Since the district court found that the redistricting plan would not have been enacted "independent of the perceived compulsion of the Voting Rights Act," the only "compelling interest" that remains for Appellees to invoke

is the alleged perceived need to comply with § 2. App. J.S. 108a. This "interest" -- an after-thought by the State following the Court's decision in *Shaw* -- is contrary to the legislative history of the North Carolina redistricting plan, has no support in the record, and is clearly a post hoc rationalization. Since this purpose now being asserted by the Appellees "could not have been a goal of the legislation," it must be disregarded. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648, n. 16 (1975).

The district court's ruling that the North Carolina redistricting plan is "narrowly tailored" within the meaning of the strict scrutiny test is inconsistent with its finding that (a) the two majority-black districts are "highly irregular in their shapes and extreme in their lack of geographical compactness as compared to other districts of the plan or to other districts nationally," and (b) these "are not the two most geographically compact majority-minority districts that could have been created were no factors other than equal population requirements and effective minority-race voting majorities considered." App. J.S. 108a-109a; 861 F.Supp. at 473. The "rational districting principles" by which the majority in the district court sought to establish "narrow tailoring" also are unconvincing post hoc rationalizations, which reflect that court's faulty methodology.

Although this methodology had numerous defects, three are salient. First, the district court misallocated to Plaintiff-appellants the burden of persuasion as to "compelling interest" and "narrow tailoring." Instead, once racial gerrymandering had been established, the burden of producing evidence and the burden of persuasion should both have rested on the Appellees. Secondly, in defiance of the redistricting plan's legislative history -- which

revealed what the General Assembly did and why -- the district court relied uncritically on a fictitious legislative intent predicated in large part upon information *unavailable* to the General Assembly in January 1992 when the plan was adopted. Finally, for the majority in the district court the premise apparently was that the end justifies the means and that therefore the plan should be upheld so long as it resulted in electing two African-Americans to Congress. Thus, evils of past racial segregation were to be "remedied" by racially segregating voters in different congressional districts.

ARGUMENT

I. The Trial Court Clearly Erred in Ruling That North Carolina's Racially Gerrymandered Plan Furthered any "Compelling State Interest."

A. The "Bizarre" Redistricting Plan Was a Flagrant Racial Gerrymander Requiring "Strict Scrutiny."

In *Shaw*, the Court held that racial gerrymanders must be treated like other race-based classifications and that, accordingly, their racial purpose triggers strict scrutiny. *Miller* reaffirmed this holding, and also made clear that, although the "bizarre appearance" of a redistricting plan may be persuasive evidence of a racial gerrymander, a plan that is not "bizarre" in appearance may still be a racial gerrymander. Both the appearance of the North Carolina plan[15] and its unparalleled flouting of

[15]In *Shaw* the majority observed, "It is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past." 113 S.Ct. at 2824.

traditional districting principles -- such as contiguity and geographical compactness -- reveal unmistakenly the "overriding" race-based purpose of the General Assembly.[16] Furthermore, the plan's legislative history --

[16]In *Village of Arlington Heights v. Metropolitan Dev. Corp.*, 429 U.S. 252, 265-66 (1977) the test applied by the Court was whether the questioned legislation would have been enacted in the absence of a race-based purpose. Cf. *Hunter v. Underwood*, 471 U.S. 222 (1985); *Mt. Healthy City School District Bd. of Education v. Doyle*, 429 U.S. 274 (1977); *Washington v. Davis*, 426 U.S. 229 (1976). Accordingly, the majority in *Shaw* concluded from the Court's voting rights and race discrimination precedents that, "redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race'... demands the same close scrutiny that we give other state laws that classify citizens by race." In *Shaw* the Court also pointed out that *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) supports the position "that district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause *regardless of the motivations underlying their adoption.*" *Id.* at 2826 (Emphasis added).

In *Miller* the lower court had found that the legislature's racial purpose was "predominant" and "overriding." Therefore, it was unnecessary for this Court to decide whether a purpose that was less than "predominant" would suffice to establish a *Shaw* claim. Accordingly, the reference in *Miller* to the "predominant" and "overriding" purpose of the Georgia legislature should not be viewed as requiring that a plaintiff satisfy more than the "mixed motives" test for deciding whether racial classifications in redistricting trigger "strict scrutiny." To establish a unique and more demanding test than "mixed motives" would be inconsistent with *Arlington Heights* -- which *Miller* and *Shaw* cite approvingly -- and also with several other well-established precedents applying this test. *See* generally Blumstein, *Racial Gerrymandering and Vote Dilution: Shaw v. Reno in Doctrinal Context*, 26 RUTGERS L.J. 518 (1995). Thus, such an interpretation of *Miller* would violate the teaching of *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 2111 (1995), where the Court emphasized the importance of "consistency" in the judicial treatment of governmental racial classifications. However, in the present case, it is immaterial whether less than a "predominant" racial purpose would suffice,

including the candid remarks by Senator Dennis Winner on the floor of the North Carolina Senate -- makes clear the dominant race-based legislative purpose. As in *Miller*, "[b]eyond any question" the state's "dominant concern" in enacting its second redistricting plan was to create two majority-black districts and obtain preclearance from the Justice Department by capitulating to its inappropriate enforcement demands.

The "bizarre appearance" of a redistricting plan may not only be evidentiary of the race-based legislative purpose but also may increase the plan's potential for harm. That appearance will constantly suggest to voters that each legislator has been elected primarily to represent persons of the legislator's own race.[17] Likewise,

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because *all* the evidence makes it obvious that the "predominant, overriding" purpose of the North Carolina General Assembly was race-based -- to assure the election of two African-Americans to Congress -- and any other purpose was subordinate thereto.

[17]The effect of this suggestion on voters is reflected in the testimony of Plaintiff-appellant Shimm that, as a white voter in the majority-black Twelfth District, he felt that "we are orphans." Shimm Dep. at 12. Furthermore, as the Court pointed out in *Shaw*, including "in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group -- regardless of their age, education, economic status, or community in which they live -- think alike, share the same political interests, and will prefer the same candidates at the polls." 113 S.Ct. at 2827. Plaintiff-appellant Shimm also testified that, "even more objectionable, it seems to me, is this notion that blacks only can represent blacks because the corollary of that is if blacks only can represent blacks, then blacks can only represent blacks. And this supplies, I think, a very good basis for anybody who is so inclined to

it sends to elected representatives a message that is "equally pernicious. When a district obviously is created solely to effectuate the perceived common interest of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Shaw,* 113 S.Ct. at 2827.[18]

North Carolina's "bizarre districts detached from meaningful geographic referents" are "transparently racial classifications." O'Rourke, *supra* n. 8 at 772. Therefore they constantly reinforce racial stereotypes and remind voters that race is being used by government as the basis for allocating rights and responsibilities. Cf. *Shaw,* 113 S.Ct. at 2827. These districts "stigmatize individuals by reason of their membership in a racial group and. . . incite racial hostility." *Id.* at 2824. Moreover, when, as in North Carolina, the majority-black districts are created by splitting predominantly white precincts and census blocks

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say, 'I am not going to vote for a black.' And in the long run, I think it is a far more pernicious consequence." Shimm Dep. p. 60. For a general discussion of "descriptive representation" versus "substantive representation" in Congress, see Carol Swain, Black Faces, Black Interests: The Representation of African-Americans in Congress (1993).

[18]The record in this case makes clear that this is more than a theoretical concern. As Chief Judge Voorhees points out, "Indeed, the testimony of District 12's congressional representative, Mel Watt, speaks for itself. *See,* e.g., Tr. 999-1001 ("representing a district that you are consistent with in your philosophies allows you to be consistent in voting your conscience *without buckling under* or *catering*, as you said my statement said, to other interests that may not predominate in my district [such as the 'business or *white community*']") (emphasis added). App. J.S. 120a, n. 5; 861 F. Supp. at 478, n. 5.

to provide "white corridors" connecting concentrations of blacks, the white "filler people" are rendered less able to participate effectively in the process of electing representatives in Congress. In light of the serious harms threatened by North Carolina's flagrant use of race to classify voters, *no* claimed state interest should be considered "compelling" enough to pass the "strict scrutiny" test.

B. Section 5 of the Voting Rights Act Provides No Justification for this Racial Gerrymander.

Under § 5 of the Voting Rights Act, any "covered" jurisdiction must obtain "preclearance" by the Department of Justice or by the United States District Court of the District of Columbia before any voting standard, practice, or procedure can be altered. To be precleared, "covered" jurisdictions must demonstrate that the intended changes do not have a discriminatory purpose or effect. 42 U.S.C. § 1973c.

Miller has reaffirmed the holding in *Beer v. United States*, 425 U.S. 130, 141 (1976), that the "nonretrogression" principle governs as to the "effects" prong of § 5. Thus, as *Beer* makes clear, a "covered" jurisdiction is not obligated to maximize the political strength of minority voters, but only "to insure that no voting procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.* at 141. If a "covered" jurisdiction proposes a plan that increases the number of majority-minority districts, that plan is "ameliorative" and does not violate the "effects" component of § 5. *See Beer, as reaffirmed* in

Miller, 115 S.Ct. at 2492.

In recent years the Department of Justice has disapproved several "ameliorative" redistricting plans because they did not maximize black voting strength. Apparently the premise for the denials of preclearance was that a State which had not maximized minority voting strength -- as required by the "max-black," "if-you-can-you-must" policy adopted by the Department of Justice -- could not possibly demonstrate that its plan had a nondiscriminatory purpose.[19] In this way the denial could be predicated on the "purpose," rather than the "effects," prong of § 5. Thus, even though Louisiana had lost one of its eight seats in Congress as a result of the 1990 census, the Department of Justice made clear that, unless a second minority-black district were added, preclearance would be denied. *Hays v Louisiana* (hereinafter *Hays*), 839 F.Supp. 1188, 1196-97, n. 21 (W.D.La. 1993) vacated, 114 S. Ct. 2731 (1994). The Department of Justice denied preclearance to Georgia until its redistricting plan finally was revised to increase majority-black seats from one to three -- instead of from one to two, as the State had originally proposed. *Miller,* 115 S.Ct at 2491. Likewise, even though previously North Carolina had no majority-black congressional districts, its first redistricting plan was denied preclearance because it had created only one majority-black district.

In ruling on Louisiana's redistricting plan, a three-

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[19]This premise is at odds with this Court's precedents that "discriminatory purpose" implies that the decision-maker selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects. *Personnel Administration v. Feeney,* 442 U.S. 256, 279 (1979).

judge district court expressed the view that the Department of Justice policy far exceeded its preclearance authority under § 5 and produced a result that Congress had expressly prohibited. *See Hays,* 839 F.Supp. at 1196-97, n. 21. The three-judge district court which considered the Georgia plan reached a similar conclusion -- which this Court has now affirmed in *Miller*.[20] In rejecting the "maximization policy," the Court noted that it was "inappropriate for a court engaged in constitutional scrutiny to accord deference to the Justice Department's interpretation of the Voting Rights Act." *Miller,* 115 S.Ct. at 2491. Moreover, by requiring race-based districting, this interpretation of the Act raises "a serious constitutional question," and "brings the Voting Rights Act . . . into tension with the Fourteenth Amendment." *Id.* at 2492-93. Because "there is no indication Congress intended such a far-reaching application of § 5," the Court "reject[ed] the Justice Department's interpretation of the statute and avoid[ed] the constitutional problem that interpretation raises." *Id.* at 2493.

By ruling invalid the "maximization policy" of the Civil Rights Division, the Court removed the basis for the denial of preclearance to the first two Georgia redistricting plans. While acknowledging that the Department of Justice can deny preclearance because a state has failed to establish a nondiscriminatory purpose for its redistricting plan, the Court pointed out in *Miller* that Georgia's Attorney General had "provided a detailed

[20]Other unwarranted attempts by the Civil Rights Division to extend its preclearance authority under § 5 have recently been rebuffed by the United States District Court for the District of Columbia. *See Georgia v. Reno*, 881 F. Supp. 7 (D.D.C. 1995); *New York v. United States*, 874 F. Supp. 394 (D.D.C. 1994).

explanation for the State's initial decision not to enact the max-black plan." *Id.* at 2492. Thus, it was apparent that the Justice Department had no reason to doubt the State's claimed nondiscriminatory purpose other than Georgia's failure to follow the maximization policy; and its denial of preclearance based on "purpose" was an attempt to achieve indirectly a result which neither Congress nor the Constitution authorized it to achieve directly. *Id.* at 2492-93.

Clearly *Miller* governs the present case. In its original plan, the General Assembly created North Carolina's first majority-black district in modern history. In support of that plan -- for which every African-American legislator had voted -- the leadership of the General Assembly submitted extensive information to the Civil Rights Division. Of special significance is a Memorandum dated October 14, 1991 -- submitted in behalf of Dan Blue, the African-American Speaker of the House; Toby Fitch, an African-American who co-chaired the House Redistricting Committee, and others. Ex. 25. This Memorandum made many arguments on behalf of the redistricting plan -- one of the most persuasive being that if a second majority-black district was created, it would not be "compact" and therefore the voters would not have effective representation. *Id.* at 34, 66.[21]

The Assistant Attorney General's objection letter of December 18, 1991, observes that the State had failed to present an "alternative plan providing for a second majority-minority congressional district," even though the

[21]In footnote 9 of his dissent, Chief Judge Voorhees discusses this Memorandum in some detail. *See* App. J.S. 123a-24a; 861 F.Supp. 480-81.

NAACP and the ACLU had expressed "significant support for a second district." J.A. 152-53. Obviously this letter reflects the "max-black" policy of the Civil Rights Division.

In view of *Miller's* holding that, under similar circumstances, the denial of preclearance to a Georgia redistricting plan did not give rise to a "compelling State interest" within the meaning of the strict scrutiny test, the objection letter of December 18, 1991 provides no justification for North Carolina's racial gerrymandering. Just as in *Miller,* the Justice Department was not free to ignore the State's explanation of its first redistricting plan and arbitrarily equate the failure to maximize majority-black districts to a failure by the State to establish a nondiscriminatory purpose.

In *Shaw* the Court acknowledged that a State has a "very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and as applied." 113 S.Ct. at 2830. The corollary of this proposition is that no "interest" exists in complying with federal antidiscrimination laws that are misapplied and misinterpreted. In *Miller* the Court made clear that the "maximization policy" of the Civil Rights Division was a misapplication and misinterpretation of the Voting Rights Act. Therefore it did not give rise to a "compelling interest" for Georgia finally to adopt under Justice Department pressure a redistricting plan which maximized majority-black districts. Likewise, the denial of preclearance under § 5 for North Carolina's first redistricting plan because of the failure to create an additional majority-black district did not give rise to any "compelling interest" in enacting the second redistricting plan.

C. Section 2 of the Voting Rights Act also Provides No Justification for this Racial Gerrymander.

When this case was originally argued before the Court on April 20, 1993, the State's justification centered on § 5. In its version of the "Nuremberg defense," the State maintained that it had not violated Plaintiff-appellants' equal protection rights because the Department of Justice would never have granted preclearance unless the plan had created two majority-black districts.[22]

After losing on appeal in *Shaw*, the State also has attempted to justify the racial gerrymander by invoking a newly-perceived "compelling interest" in compliance with § 2 of the Voting Rights Act. This belated attempt encounters many obstacles. The most serious is that the relevant facts belie the claimed "compelling interest." As Chief Judge Voorhees makes clear in his dissent, "there is absolutely no evidence in the legislative history of Chapter 7 regarding violations of the Voting Rights Act, or the necessity for any remedial action, other than as a response to the Attorney General's objections lodged against the State's initial redistricting proposal." App. J.S. 123a, 861 F.Supp. at 480. Moreover, "no legislative findings were

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[22]In addition to portions of the argument quoted earlier in this brief, *supra* at 4, the counsel for the state Defendants stated to the Court: "The determining factor in this case is that North Carolina is subject to Section 5 preclearance," Oral Argument at 36, and "Section 2 may, depending on the particular demographics and the situation of the State, require majority-minority districting, *but once again, that's not this case." Id.* at 38 (emphasis added).

ever made during the redistricting process concerning the relevance of the factors set out in *Gingles;* on the contrary, in its submission to the Department of Justice in support of Chapter 601, its original redistricting plan, the State expressly disavowed the importance thereof altogether." *Ibid.*

Despite the argument now being advanced by the State, there is no reason why the General Assembly would have been concerned about the possibility an imagined plaintiff would file an action under § 2. No such action could be successfully maintained unless the three *Gingles* conditions could be satisfied. See *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); *Growe v. Emison*, 113 S.Ct. 1075 (1993); *Johnson v. DeGrandy*, 114 S.Ct. 2647 (1994). The General Assembly's own filings with the Department of Justice on behalf of the first redistricting plan had demonstrated convincingly that failure to create two majority-black districts could not be the basis for a successful § 2 action because the *Gingles* requirement could not be met.

As is apparent from the facts recited in *Shaw*, 113 S.Ct. at 2820, the black population of North Carolina is too dispersed to allow creation of two "geographically compact" majority-black districts. African-Americans are a majority in only 5 of the State's 100 counties; and of those five counties -- all in eastern North Carolina -- four have a small population and the fifth is only mid-sized. Because the percentage of African-Americans in the voting age population -- 20% -- is less than the percentage in the total population, the task of creating two such districts is even more onerous.

Nevertheless, the majority below recites that "numerous plans presented to the General Assembly had

demonstrated that the state's African-American population was sufficiently large and geographically compact to constitute a majority in two congressional districts." App. J.S. 91a; 861 F.Supp. at 463-64. Judge Phillips cites nine plans in support of this remarkable conclusion. Examination of the maps incorporating each of these plans will make it apparent that none of these plans is "geographically compact" within the customary meaning of that term.[23]

The majority also states that two plans prepared by the Plaintiff-intervenors were "'geographically compact' under any reading of *Gingles.*" App. J.S. 93a; 861 F.Supp. 464-65. This statement is also astounding because the two plans cited -- "Shaw II" and "Shaw III" -- do not create two majority-black districts. Instead, they create a majority-black district -- the "compactness" of which is questionable -- and a plurality-black district in which African-Americans are less than 42 percent of the voting age population.[24] During the four years since the

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[23]All of these maps as cited by Judge Phillips in the district court are in the record and can be examined by the Court to form its own conclusion as to the likelihood of a successful § 2 action in light of the *Gingles* requirement of a "geographically compact" minority population.

[24]According to the tables which accompany the two plans, Native-Americans -- primarily in Robeson County -- constitute slightly less than 8% of the voting age population. The majority in the Court below uses the term "majority-minority district" to refer to "an electoral district in which a majority of both the registered voters and the voting age population are members of the same racial minority." App. J.S. at 8a, n. 3; 861 F.Supp. 417, n. 3. Apparently a plurality-black district would not satisfy the "maximization policy" of the Civil Rights Division; nor does the possibility of creating a plurality-black district demonstrate that the first *Gingles* condition could be satisfied

redistricting process began, no one has shown how to draw two "geographically compact" majority-black congressional districts in North Carolina. Cf. Jim Morrill, *The Redistricting Game,* The Charlotte Observer, July 18, 1993, at 1B. The finding to the contrary by the majority in the district court is wishful thinking.[25]

The prospects for imagined plaintiffs successfully to attack the first plan under § 2 would be even dimmer because racial polarization in North Carolina has been reduced by white cross-over voting. J.A. 99-102. Furthermore, "racial appeals" -- with a possible exception in 1990 -- have also become rare in North Carolina.[26]

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for purposes of a § 2 action.

[25]Indeed, the impracticality of creating more than one geographically compact majority-black district "is perhaps best demonstrated by the existence of District Twelve itself." *See* App. J.S. 128a; 861 F.Supp. at 482 (Voorhees, C.J., dissenting). Plaintiff-appellants question whether even one "geographically compact" district can be created. However, District One under the first redistricting plan was more compact than District One under the second plan -- as even Gerry Cohen acknowledged. Tr. 589.

[26]Prior to 1993, when *Shaw* was decided, white cross-over voting had enabled African-Americans to win election to office even though the constituency was predominantly white. *See Shaw,* 113 S.Ct. at 2831; Stips. 137-43, 145. In 1994, Henry McKoy, a black Republican, defeated a white incumbent to win election to the state Senate from District 14 in Wake County -- which is predominantly white. *See* News & Observer, Raleigh NC, November 9, 1994. Meanwhile, outside North Carolina, Gary Franks and J.C. Watt -- both African Americans -- have been elected to Congress from overwhelmingly white constituencies, and today General Colin Powell, an African-American, is among the most popular individuals in public life.

The purported "compelling interest" of the State in complying with § 2 is especially suspect because it is so enmeshed with the Justice Department's use of an illegal criterion in denying preclearance under § 5. The Defendants have argued that the failure of the State to maximize its majority-black districts justified the Civil Rights Division in denying preclearance because the State had not demonstrated the absence of a discriminatory purpose. Now they argue that the denial of preclearance alerted the General Assembly to the likelihood of a successful action against the State under § 2 if a second majority-black district were not created.

The fallacy of this contention has already been discussed. In the first place, it requires an assumption that the legislature had a purpose which the legislative history clearly shows was absent. Certainly this Court should not accept at face value the State's assertion now of a legislative purpose to comply with § 2, when it is apparent from an examination of the plan and its legislative history that the purpose now being relied on "could not have been a goal for the legislation" in January 1992, when the plan was enacted. Cf. *Weinberger v. Wiesenfeld, supra; Califano v. Goldfarb*, 430 U.S. 199, 209, n. 8 (1977); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 728 (1982); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 495 (1989).

Secondly, even if the denial of preclearance had created alarm on the part of the General Assembly that a successful § 2 action might be maintained, this still would not provide a "strong basis in evidence" that the State had a "compelling interest" in creating two majority-black districts. Because the denial was predicated on an illegal policy of the Civil Rights Division, it was entitled

to no weight in determining the likelihood of a successful § 2 action. To give weight to the denial permits the Civil Rights Division finally to arrive by a tortuous route at the objective which it sought initially to reach under its illegal "maximization policy" for § 5 preclearances.

Furthermore, a denial of preclearance should never be considered to have provided "a strong basis in evidence" for a legislature to conclude that it would be subject to a successful § 2 action. The denial takes place without an administrative hearing; and the burden of proof is on the State to show absence of a nondiscriminatory purpose. On the other hand, in an action under § 2 the plaintiff bears the burden of proof to show that a State has acted with a discriminatory purpose.[27] Indeed, since the General Assembly had readily available under § 5 a judicial remedy to determine whether the denial of preclearance was proper but failed to use this remedy, the denial should not be considered to provide any evidence that the State had acted with a discriminatory purpose in creating only one majority-black district.

In *Shaw,* Justice O'Connor used the term "strong interest" -- rather than "compelling interest" -- in referring to a State's interest in compliance with federal voting rights legislation. This selection of terms was wise, because such an interest is not "compelling" enough to justify inflicting on voters the evils of a flagrant racial gerrymander. Indeed, it would be anomalous to conclude

[27]*New York v. United States*, 874 F. Supp. 394 (D.D.C. 1994) points out major differences between § 5 preclearance and § 2 lawsuits.

that a State's enactment of a redistricting plan susceptible to attack under § 2 provides that State an "interest" in segregating its voters into different districts based on race. Instead the "interest" would be to enact a race-neutral plan that would draw citizens together, rather than "polarize" them racially.

II. The Redistricting Plan, Which Violated Every Customary and Traditional Redistricting Principle, Was Not "Narrowly Tailored."

A. The District Court's "Narrow Tailoring" Analysis Conflates Consideration of the State's "Compelling Interests" With Consideration of the Appropriate Means for Achieving Those Interests.

In applying the "strict scrutiny" test, the majority in the district court considered the issue to be whether North Carolina "had a compelling interest in enacting *any* race-based redistricting plan" -- rather than in "enacting the particular race-based redistricting plan under challenge." App. J.S. 43a-44a; 861 F.Supp. at 437 (emphasis in original).[28] In this way, the burden to be carried by the state was greatly reduced and "narrow tailoring" was virtually eliminated from consideration.[29]

[28]The issue as stated by the majority in the district court implies that if a State has a "compelling interest" in creating one race-based majority-black district, it may create several race-based districts in total disregard of traditional districting principles.

[29]Judge Jones pointed out in *Vera v. Richards* (hereinafter *Vera*), 861 F.Supp. 1304, 1333, n. 40 (S.D.Tex. 1994), prob. juris. noted, 115 S.Ct. 2639 (1995), that if the North Carolina districts can "survive constitutional strict scrutiny, then *Shaw* may be a meaningless

The district court's approach conflates the analysis of ends with the analysis of means. *Cf. Metropolitan Insurance Co. v. Ward*, 470 U.S. 869, 898 (1985) (O'Connor, J. dissenting) (objecting to conflation of the analysis of goals and means to achieve those goals). Strict scrutiny has two components. The first is the examination of whether the State has a sufficiently weighty interest that is being promoted by a challenged classification -- whether it has a "compelling interest." The Court must undertake this substantive evaluation of the importance of the goals being pursued, for race is a suspect basis of decision-making -- whatever race is advantaged or disadvantaged -- and can only be justified in the name of the most compelling governmental goals.

The second component of strict scrutiny focuses on the relationship of the means and ends -- the "fit" between the State's interest in addressing voting rights concerns and the form of the districts that must be "narrowly tailored" to suit them. *See Vera*, 861 F.Supp. at 1344, n. 55. In the context of race-based decision-making, the State must pursue its compelling interest in a way that minimizes the harm from its use of the presumptively unconstitutional criterion of race. Only if a State is unable to meet its goal in a reasonable manner by the use of race-neutral alternatives may it resort to the use of race -- even then, only to the least amount feasible.

As Chief Judge Voorhees makes clear in his dissent, the analysis by the majority in the district court is exactly contrary. App. J.S. 141a-53a; 861 F.Supp. 489-96. The use of majority-black districts becomes an end in itself; and no consideration is given to less race-based

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exercise."

alternatives. Moreover, *any* two majority-black districts will suffice. "In what can only be described as a legal leap of faith," the majority jumps to the conclusion "that whatever districts [are] actually created to preempt liability under the Voting Rights Act need not reflect or incorporate the specific compact minority populations which would allegedly trigger the § 2 violation." App. J.S. 143a; 861 F.Supp. at 491.[30] Not only does this conclusion appear inconsistent on its face with the term "narrow tailoring," but also it is at odds with *Shaw's* implication that a majority-black district can be created only when the State "employs sound districting principles" and only when the affected racial group's "residential patterns offer the opportunity of creating districts in which they will be in the majority." 113 S. Ct. at 2832.

In excusing the North Carolina plan's total disregard of traditional districting principles, the majority in the court below asserts in an extensive footnote that "objective evidence" reveals -- "perhaps counter-intuitively" -- that "bizarre," "ugly" shapes really make no difference because, in due course, voters will learn who represents them in Congress.[31] This "counter-intuitive" view is at

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[30]In view of the majority's novel view of compactness and contiguity, a skilled computer operator would be free to create majority-black districts consisting of pockets of African-Americans spread all across North Carolina but linked together by tiny corridors of white "filler people." Far more reasonable is the approach of the *Vera* court which observed that "to be narrowly tailored, a district must have the least possible amount of irregularity in shape, making allowance for traditional districting criteria." 861 F.Supp. at 1343. *See also* O'Rourke *supra* n. 8 at 755-58.

[31]App. J.S. 106a, n. 60; 861 F. Supp. at 472, n. 6. This footnote contains no citations; and so it is unclear what "objective

odds with Professor O'Rourke's testimony that Plaintiff-appellants Shaw and Shimm, along with *all* other voters in the Twelfth District, were specially injured by being placed in that district, because its confusing boundaries and its bisecting of several Metropolitan Statistical Areas (MSA's) and several media markets make the district "dysfunctional." Tr. 209, 219-20, 232. This expert opinion was fully corroborated by evidence at trial which made clear that creating "bizarre" districts in defiance of sound districting principles harms effective representation.[32]

The "counter-intuitive" view of the majority below is also contrary to the position taken in the October 14, 1991 Memorandum from the General Assembly to the Department of Justice. There it is stated (Ex. 25 at 34):

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evidence" the majority had in mind. Plaintiff-appellants submit that any such "evidence" -- as well as common sense -- points in the opposite direction.

[32]For example, according to a poll commissioned by the State defendants and conducted in October and November 1993, only 6% of the voters in the Twelfth District knew that Melvin Watt was their Congressman; another 6% of the voters believed their Congressman was [Senator] Jesse Helms; 8% believed their Congressman was Alex McMillan (who represented the Ninth District), and 12% believed their Congressman was Howard Coble (who represented the Ninth District). Tr. at 841-842, 866-869 (Litchman Test.). The headline "2nd, 12th District lines still unclear for many voters," which appeared in the Durham, North Carolina Herald-Sun on November 9, 1994 (p. A7) attests to the continuing confusion of North Carolina voters about the boundaries of Congressional districts. The confusion is probably increasing, rather than diminishing, because after the 1994 election two Representatives from North Carolina reside outside their districts. Representative Jones of the Third District, resides in Farmville, which is in Representative Eva Clayton's First District; and Sue Myrick who represents the Ninth District resides in Congressman Mel Watt's Twelfth District.

"A district could not be sufficiently compact if it was so spread out that there was no sense of community; that is to say, if its members and its representatives could not effectively stay in touch with each other, or if it was so convoluted there was no sense of continuity -- namely, if its members could not easily tell who actually lived within the district."

Likewise, Judge Edith Jones pointed out in *Vera:*

> Traditional, objective districting criteria are a concomitant part of truly "representative" single member district plans. Organized political activity takes place most effectively within neighborhoods and communities; on a larger scale, these organizing units may evolve into media markets and geographic regions. When natural geographic and political boundaries are arbitrarily cut, the influence of local organizations is seriously diminished. After the civic and veterans groups, labor unions, chambers of commerce, religious congregations, and school boards are subdivided among districts, they can no longer importune their Congressman and expect their Congressman to wield the same degree of influence that they would if all their members were voters in his district. Similarly, local groups are disadvantaged from effectively organizing in an election campaign because their numbers, money, and neighborhoods are split. Another casualty of abandoning traditional districting principles is likely to be voter participation in the electoral

> process. A citizen will be discouraged from undertaking grass-roots activity if, for instance, she has attempted to distribute leaflets in her congressman's district only to find that she could not locate its boundaries.

861 F.Supp. at 1334-35, n. 43.[33]

Congress has required that representatives be elected from single-member districts. 2 U.S.C. § 2 (c). This requirement makes no sense unless the legislative intent was that the districts be created in accord with traditional districting principles, such as compactness, contiguousness, community of interest, and respect for political subdivisions. If, instead, districts can be such "crazy quilts" that voters do not know who represents them and "representatives" have no idea whom they are "representing," what is the point of having such geographical districts? Indeed, forbidding a State to use rational systems of proportional representation, such as cumulative voting or single transferable voting, is totally illogical if proportional representation may be accomplished by means of computer-generated gerrymanders which violate every rational districting

[33]Judge Jones added: "As the influence of truly local organizations wanes, that of special interests waxes. Incumbents are no longer as likely to be held accountable by vigilant, organized local interests after those interests have been dispersed. The bedrock principle of self-government, the interdependency of representatives and their constituents, is thus undermined by ignoring traditional districting principles." *Id.*

principle.[34]

The majority in the district court sought to salvage the plan by finding that there are "internally homogenous communities of interest" in the two majority-black districts. App. J.S. 109a; 861 F.Supp. at 473. However, the five announced redistricting criteria were never amended by the General Assembly to include "homogeneity" or "commonality of interest." Stip. 43. Furthermore, the entire legislative record -- which was an exhibit at trial -- contains no reference to the "distinctiveness" or "homogeneity" of the voters placed in the two majority-black districts. Tr. at 1028, 1037, 1041, 1046-48 (Pope Test.).

When the second redistricting plan was drawn by use of computer technology, the only data available for use in achieving "homogeneity" were racial data. Therefore, in combining the State's 229,000 census blocks into congressional districts, "homogeneity" could only be sought for by using race as *the* governing criterion. Thus, if the General Assembly did have a goal of "homogeneity," it obviously was relying on the racial stereotype "that members of the same racial group -- regardless of their age, education, economic status, or the community in

[34]The flagrant disregard of districting principles like compactness not only contravenes the intent of 2 U.S.C. § 2(c), but may violate the Equal Protection Clause. *See Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (reapportionment "presented little more than crazy quilts, completely lacking in rationality, *and could be found invalid on that basis alone*") (emphasis added); *Drum v. Seawell*, 250 F.Supp. 922, 925 (M.D.N.C. 1966) (three-judge district court held unconstitutional North Carolina's 1966 political gerrymander of congressional districts and commented that "compactness and contiguity are aspects of practicable equality".)

which they live -- think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw,* 113 S.Ct. at 2827. Such reliance in redistricting is condemned by *Shaw* and by *Miller*.[35]

B. The Absence of a Meaningful Relation Between the Claimed State Interest and the Redistricting Plan Purportedly Intended to Vindicate That Interest Reveals the Absence of Any "Narrow Tailoring."

In *Richmond v. J. A. Croson,* 488 U.S. 469 (1989), a remedial plan was held invalid because of the lack of relationship between the remedy and the persons who have been burdened by past racial discrimination.[36] Implicit in this case is the principle that there should be some nexus or relationship between the right or interest being vindicated and the relief being granted.[37] Moreover, the Court appears unwilling to provide remedies for generalized past discrimination. Cf. *Freeman v. Pitts,* 503 U.S. 467 (1992).

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[35]The General Assembly was giving no consideration to any community of interest among whites, but instead was using them as "filler people" to connect black population concentrations and to meet equal population requirements. This disparate treatment of voters based on race also violates the Equal Protection Clause.

[36]The "bizarre appearance" of the North Carolina redistricting plan not only evidences the race-based purpose of the plan but also reveals unmistakably that the plan lacks the close relationship between right and remedy that is necessary for "narrow tailoring".

[37]In a similar manner, the Court has ruled that when property is taken for a public purpose, due process requires "essential nexus," "rough proportionality" and "individualized determinations." *Dolan v City Tigard*, 114 S. Ct. 2309 (1994).

As the plan and its legislative history both reveal, the General Assembly made no effort to relate the relief being granted to any prior deprivation of voting rights. Of the forty North Carolina counties "covered" under § 5, sixteen are outside of either the First or the Twelfth Districts; and only two are even partly included in the Twelfth District. Stips. 108, 110. Of the 553,396 citizens who reside in the Twelfth District, 405,150 -- or approximately 73.4% -- reside in counties which have never been subject to preclearance under § 5. Clearly, there was no lack of "political participation" on the part of the blacks placed in the Twelfth District, for in that district, they constitute 54.71% of the registered voter population, but only 53.34% of the voting age population. In the First District the registration of blacks is 52.41% -- not significantly lower than the 53.40% percent of blacks in the voting age population. Stips. 104, 105. Obviously, the boundaries of the two majority-black districts were not drawn to help compensate for any contemporary obstacles to the registration of black voters.

In North Carolina the registration of black voters is 95% or more Democratic, Tr. 628 (Cohen Test.); Tr. 981 (Watt Test.); Democratic primaries are closed to voters registered as Republicans, Independents or otherwise, Stips. 136, 138; when an African-American runs as a candidate, the vote of blacks for that candidate is very cohesive, Tr. 985 (Watt Test.); and there is substantial white cross-over voting. Despite these favorable conditions for electing Democratic African-American candidates to Congress, the General Assembly made no effort to determine whether alternatives short of creating two "bizarre" majority-black districts might suffice

to elect two African-Americans as representatives.[38] As the dissent of Chief Judge Voorhees makes clear, App. J.S. 141a-42a; 861 F.Supp. at 489-90, the majority in the court below erred by ignoring alternative remedies -- the first of the five factors discussed in its analysis of "narrow tailoring." App. J.S. 57a-77a; 861 F.Supp. at 444-56.

With respect to the second factor, the majority in the district court concluded that the redistricting plan was a "flexible racial goal," rather than a "rigid racial quota." App. J.S. 60a; 861 F.Supp. at 447. This finding is "clearly erroneous" and contradicts both common sense and the plan's legislative history -- including the explicit reference to "quotas" on the Senate floor by Senate Redistricting Chair Dennis Winner. There simply is no evidence that at any time during the General Assembly's consideration of the redistricting plan anyone even remotely suggested that the Representatives elected from the two majority-black districts might not be African-Americans.

The majority below treated the plan as "inherently temporary in nature," because redistricting occurs after each decennial census. App. J.S. 61a; 861 F.Supp. at 447. However, changing to a less race-based plan after the next

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[38]In order to enhance the election opportunity for minority candidates, the General Assembly changed the election laws in 1989 to dispense with a second primary if the leader in the first primary received more than 40% of the votes cast. Stip. 127; *see* N.C.G.S. § 163-111. Neither the General Assembly nor the majority in the district court below considered what effect this change and other possible race-neutral changes in the election laws might have on the election chances of African-Americans. According to the logic of *Miller*, the legislative disregard of alternative remedies cannot be justified by the unwillingness of the Civil Rights Division to accept as adequate any remedy short of maximization of majority-black districts.

census will be impeded by non-retrogression requirements of the Voting Rights Act and by the probable efforts of the two incumbents from the majority-black districts to keep those districts as intact as possible. If the majority in the district court had been more sensitive to the constitutional harm inflicted by governmental use of racial classifications, they would have viewed less favorably the prospect that this egregious racial gerrymander would continue into the next millennium.[39]

The fifth -- and final -- factor considered by the majority in the district court was "the impact of the program on the rights of innocent third parties." App. J.S. 57a; 861 F.Supp. at 445.[40] In discussing this factor, the majority ignored the constitutional injury that *Shaw* recognized. This error is highlighted by the majority's reference to "five white voters whose voting rights have

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[39]Objective observers would conclude that the "bizarre" racial gerrymander already has been in effect far too long and that the majority below ignored *Shaw's* teaching when, in January 1994, they denied a motion to enjoin use of the redistricting plan in that year's election. Termination of the racial gerrymander should take place immediately because in a vicious circle it perpetuates "racial polarization" and thereby induces indefinite continuation of the very condition that the redistricting plan purportedly is designed to remedy. Plaintiff-appellants submit that "every moment's continuance" of North Carolina's racial gerrymander "amounts to a flagrant, indefensible, and continuing violation of" the Fourteenth Amendment. Cf. *New York Times Co. v. U.S.*, 403 U.S. 713, 714 (1971) (Black, J.).

[40]As to the fourth factor, Plaintiff-appellants cannot deny that there is a close relationship between the redistricting plan's "goal" of two black representatives in the Congress and "the percentage of minorities in the relevant pool of eligible candidates." App. J.S. 57a. This is inevitable when, as here, a quota system is created on the basis of minority-percentage of the population.

been in no legally cognizable way harmed by the plan." App. J.S. 115a; 861 F.Supp.476. The basic point made by *Shaw* -- and now reemphasized by *Miller* -- is that a legally cognizable harm *is* suffered by a voter who is placed inside or outside a congressional district because of his or her race.[41] The majority below also disregards the evidence that all voters are harmed by being placed in districts which are "dysfunctional" because of their "bizarre" shape.[42]

Furthermore, attention should be given to the "innocence" of many of the voters who must bear the burden of the North Carolina racial gerrymander. The American population is quite mobile,[43] and many white voters subjected to this burden had no connection whatsoever with any past racial discrimination. For example, Plaintiff-appellant Ruth Shaw was reared in Minnesota among Norwegian-Americans, and Plaintiff-

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[41]The majority recognizes this harm in its discussion of standing and then strangely forgets it in applying strict scrutiny.

[42]"White voters" in the Twelfth District have been harmed by being placed in a district where their Representative does not favor efforts to form interracial coalitions and expresses publicly his satisfaction at not "having to cater to the business or white community." Tr. 995 (Watt Test.); see also footnote 5 of Chief Judge Voorhees' dissent. App. J.S. 128a. The confidence of his white constituents in this Congressman is also eroded by his comments on national television and at trial that Shaw is based on "racist assumptions." Tr. 995-96 (Watt Test).

[43]According to *Freeman v. Pitts*, 112 S. Ct. 1430, 1447-48 (1992), in 1987-1988, over 40,000,000 Americans -- 17.6% of the total population -- moved households. Over a third of these people moved to a different county and over 6,000,000 to a different state.

appellant Melvin Shimm in New York.[44] Furthermore, some of the supposed beneficiaries of the gerrymander may never have resided in the counties "covered" by § 5 or even resided in North Carolina while there was still any racial discrimination in access to the ballot. Indeed, in view of the mobility of the American population, the very concept of majority-minority districts to make up for past abuses is misguided.

III. The District Court Employed a Faulty Methodology

A. After the Plaintiff-Appellants Proved that the Redistricting Plan was a Racial Gerrymander, the Trial Court Should Have Placed on the Defendants the Burden of Persuasion as to "Compelling State Interest" and "Narrow Tailoring."

The majority in the district court made many clearly erroneous findings. One cause was the misallocation to the Plaintiff-appellants of the burden of persuasion with respect to "compelling state interest" and

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[44]As to "innocence" of past racial discrimination, it deserves mention that Mrs. Shaw has not hesitated to vote for black candidates against whites; and, "was part of a group that formed a coalition with the black people in Durham." Shaw Dep. at 33-34, 82. Professor Shimm, who was a member of the NAACP in his college days, pointed out eloquently that, as a Jew, he had himself experienced serious discrimination and that most of his family and his wife's had suffered severe persecution during the Holocaust. Shimm Dep. at 54-61.

"narrow tailoring."[45] In placing the burden of persuasion on plaintiffs, the district court relied on the proposition that members of a racial minority challenging a State law or policy on equal protection grounds "bear the ultimate burden of persuasion throughout the proceeding." App. J.S. 42a; 861 F.Supp. at 436."[46] More relevant, however, is the language of opinions which establish that suspect classifications -- such as those involved in a racial gerrymander -- are "presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Adm'r. v. Feeney*, 442 U.S. 256, 272 (1979); *see also Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982), *Bernal v. Fainter*, 467 U.S. 216, 228 (1984).[47]

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[45]The court below recognized that once the plaintiffs had proven a racial gerrymander, the defendants would have the burden of production as to these issues. General principles of evidence would suggest that the defendants would also bear the burden of persuasion; usually a party bears this burden as to its affirmative allegations and as to the issues on which it must produce evidence. *See* 9 Wigmore, Evidence § 2486 (Chadbourn Rev. 1981); 2 McCormick, Evidence § 337 (4th Ed. 1992). Another reason to place the burden of persuasion on the defendants was because of the invocation of various privileges to prevent the plaintiffs from obtaining evidence about some of the events that preceded the General Assembly's enactment of the racial gerrymander.

[46]The court cites *Batson v. Kentucky*, 476 U.S. 79 (1986) for this proposition. However, the citation seems anomalous in the present context, because *Batson* did not involve the strict scrutiny test and, once a peremptory challenge is proved to be race-based, it cannot be justified by any "compelling state interest."

[47]In *Hunter v. Underwood*, 471 U.S. 222, 225-28 (1985), the Court ruled unanimously that, once the plaintiffs had proved "by a preponderance of the evidence that racial discrimination was a substantial or motivating factor," they would prevail unless the defendants "proved by a preponderance of the evidence that the same decision would have resulted had the impermissible purpose not been considered." Cf. *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285-87 (1977). Such allocations of the burden of persuasion to the defendants are inconsistent with the allocation of that burden to the plaintiffs in this case.

In *Miller* the Court observed that there is "presumptive skepticism" of all racial classifications, 115 at 2491; and so the race-based Georgia districting was "presumptively unconstitutional." Id. at 2493. Similarly, in *Shaw* the Court pointed out that "a racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." 113 S.Ct. at 2828, quoting *Feeney,* supra. Such language simply cannot be reconciled with placing on the Plaintiff-appellants the burden of persuasion in this case as to the State's claimed "compelling interest" or "narrow tailoring." See also Blumstein, Racial Gerrymandering and Vote Dilution: *Shaw v. Reno* in Doctrinal Context. 26 Rutgers L.J. 518, 589 (1995).

B. The Trial Court Clearly Erred in Relying on Post Hoc Rationalizations and on a Fictitious Version of Legislative Intent.

A second major cause of error by the majority in the district court was their willingness to accept fictitious interpretations of legislative intent -- often on the basis of post hoc rationalizations. For example, in accepting the State's contention that the redistricting plan served the state's "compelling interest" in complying with § 2, the majority in the court below states that the "record as a whole firmly establishes" that, after denial of preclearance

by the Justice Department, the General Assembly "reassessed" its belief that the original plan would not violate the Voting Rights Act. App. J.S. 112a-113a; 861 F. Supp. at 474. However, the legislative record, which is in evidence, reveals no such "reassessment" but only shows the legislators were convinced -- with good reason -- that the Civil Rights Division would not preclear a plan with only one majority-black district. In this instance, as in several others, the majority below relied on assertions of a fictitious legislative intent; but this Court has made clear that legislation must not be upheld on that basis. *Weinberger v. Wiesenfeld*, 420 U.S. 641, 648 (1975).[48]

Plaintiffs moved *in limine* to exclude evidence concerning data that could not have been available to the General Assembly in January 1992, when it enacted the second redistricting plan. By divided vote, the district court denied the motion; and thereafter it made findings on the basis of post hoc rationalizations which relied on demographic data which did not become available until 1993. Consequently these findings are clearly erroneous.[49]

Undoubtedly the willingness of the majority in the district court to accept post hoc rationalizations stemmed from their fervent desire that two African-Americans from North Carolina serve in Congress for the first time since

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[48]See also *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 679 (1981) (Brennan, J., concurring in result).

[49]In *Hays*, 839 F.Supp. at 1203, the three-judge district court criticized the post hoc rationalizations with which Louisiana attempted to sustain its redistricting plan and the opinions of Dr. Lichtman, the State's expert in that case. Those criticisms apply directly to North Carolina's use of post hoc rationalizations in this case and to the opinions offered by Dr. Lichtman in this trial.

1901. This end -- however laudable -- does not justify "balkanizing" the State with racial gerrymanders, which aggravate, rather than remedy, "racial polarization." Moreover, their reference to the inability of "any African-American citizen of North Carolina, despite repeated responsible efforts, to be elected," App. J.S. 115a; 861 F.Supp. at 476, is misleading, for it fails to reveal that few blacks have run for Congress or to compare their respective experience and qualifications with the experience, qualifications and incumbency status of their opponents. Certainly the opinion provides no adequate basis for concluding either that African-Americans would never have been elected to Congress heretofore if they had run for office[50] - especially if they had attempted to form biracial coalitions - or that they cannot win today without the aid of majority-black districts.

CONCLUSION

Shaw and *Miller* describe the harm to *all* voters which springs from the misuse of racial classifications and racial stereotypes. The misuse here, as in several other

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[50]A parallel situation makes clear the danger of inferring too much from incomplete information. Currently females hold far fewer political offices than males. Is this the result of gender discrimination? A recent study by Jody Newman, the executive director of the National Women's Political Caucus, concluded that, although discrimination against female candidates is still an important issue deserving redress, to claim that such discrimination is the primary reason women do not hold the same number of political offices as men ignores a key factor -- namely, a smaller percentage of women run for office than do men. However, when they do run, women win public office to about the same extent as do men. *See* Broder, David, "Key to Women's Political Parity: Running," The Washington-Post, Federal Page, Sept. 17, 1994.

cases, resulted from the misguided and unauthorized policy of the Civil Rights Division -- which sought to exercise powers not granted to it either by Congress or by the Constitution. Once again -- as before in *Shaw* and then in *Miller* -- this Court should express its strong disapproval of race-based laws and racial classifications. "Strict scrutiny" must not become a "paper tiger."

Plaintiff-appellants recognize that the advocates of racial gerrymanders will attempt to evoke fears of judicial entry into a "political thicket."[51] More than three decades ago similar attempts were made when the Court was considering whether to enforce judicially the "one-person, one-vote" principle -- rather than leave its enforcement to the tender mercies of legislatures. Fortunately, the Court moved forward then; and, hopefully, it will not halt now in dismantling racial gerrymanders and racial stereotypes. Therefore, for the reasons stated here and in the discerning dissent of Chief Judge Voorhees, the decision of the district court should be reversed.

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[51]In this vein, the majority in the district court "issue[d] an expression of judicial restraint that is, frankly, hard to swallow." *Vera*, 861 F.Supp. at 1345, n. 55. Federal judges already "are routinely deciding" similar issues "in § 2 vote dilution cases." *Ibid.*

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QUESTIONS PRESENTED

I. Must North Carolina's Congressional Redistricting Plan Undergo Strict Scrutiny Where Race Was A Motivating But Not Predominant Factor In the Drawing of the Districts?

II. Is North Carolina's Congressional Redistricting Plan Justified by Compelling State Interests In Complying With the Voting Rights Act and Remedying Discrimination?

III. Did the Court Below Correctly Hold That North Carolina's Congressional Redistricting Plan Is Narrowly Tailored?

IV. Do the Plaintiffs Have Standing To Challenge North Carolina's Redistricting Plan Where They Have Proven No Injury?

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STATEMENT

I. Prior Proceedings

This Court first considered the legal sufficiency of plaintiffs' claim that North Carolina's congressional redistricting plan violated their right to equal protection of the laws on appeal of a motion to dismiss. The case was remanded to the District Court following this Court's opinion in *Shaw v. Reno,* 113 S.Ct. 2816 (1993). Shortly after remand, Ralph Gingles, the lead plaintiff in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and twenty-one other black and white North Carolina voters,[1] were granted leave to intervene as defendants on September 7, 1993, J.A. 9-10.[2]

Subsequently, the court below allowed eleven registered voters and members of the Republican Party to intervene as plaintiffs, none of whom live in either the 1st or the 12th District J.A. 13. *See* Motion to Intervene by James Arthur "Art" Pope, et. al. at 3-5. The lead plaintiff-intervenor, Art Pope, was also the lead plaintiff in *Pope v. Blue*, 809 F. Supp 392 (W.D.N.C. 1992), *aff'd mem.* 113 S.Ct. 30 (1992), J.S. 10a, 14a, an earlier challenge to the same redistricting plan on the grounds that it was a political gerrymander.

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[1]Sixteen of the defendant-intervenors [hereinafter "Gingles defendants"] live in either the 1st or 12th Congressional Districts, the two majority-minority districts in North Carolina. D.I. Stip. 82.

[2]This brief uses the following abbreviations:

J.A.	- Joint Appendix
J.S. __a	- Appendix to Jurisdictional Statement (opinion below)
Tt.	- Transcript of trial, March 28 - April 4, 1994
Ex.	- Trial Exhibit
Stip.	- Stipulations by the Parties (signed by all parties March 21, 1994)
D.I. Stip.	- Stipulations Offered by Defendant-Intervenors (signed by all parties March 21, 1994)
Dep.	- Depositions received in evidence

At trial before the three-judge court, extensive oral and documentary evidence was presented by all parties, including testimony received in the form of written narrative statements and depositions. J.S. 15a, n.8. On August 22, 1994, the court below ruled that the congressional redistricting plan was narrowly tailored to further one or more compelling state interests. J.S. 111a. The plaintiffs and plaintiff-intervenors now appeal that ruling.

II. Facts

The redistricting plan adopted by the North Carolina General Assembly in January 1992 (Chapter 7) provides African-American voters an equal opportunity to elect candidates of their choice to Congress for the first time in this century, by creating two districts with a bare majority of African-American voters. At the time Chapter 7 was enacted, blacks constituted 50.53% of the registered voters in the 1st District and 53.54% of the registered voters in the 12th District. J.S. 108a, J.A. 553. African-Americans are only a slight majority of the voting age population in the two districts, comprising 53.40% and 53.34% of the total voting age population in the 1st and 12th Districts respectively. J.A. 552. A variety of historical and current circumstances, as well as diverse and legitimate state interests, led to this plan's adoption.

The court below made extensive findings of fact regarding the development and enactment of North Carolina's congressional redistricting plan. J.S. 78a-109a. The court described the legislative setting, J.S. 78a-81a, summarized the basic geographic and demographic features of the state, including the concentration of African-Americans in the Coastal Plain and Piedmont regions, J.S. 81a-83a, reviewed the legislative process, J.S. 84a-88a, identified the motives behind the decision to enact Chapter 7, J.S. 89a-97a, analyzed the six factors that primarily determined the location and shapes of the challenged districts, 97a-102a, and described the

communities of interest recognized by those districts, 102a-105a. The court also evaluated the degree to which the challenged districts provide for fair and effective representation, 105a-106a, and the extent to which the districts are located in areas of the state where previous Voting Rights Act violations have occurred. J.S. 107a-108a.

The State Appellees' Brief provides a comprehensive summary of the evidence presented at trial. *See* State Appellees' Brief at pp. 4-26. Therefore, rather than presenting a detailed factual narrative, we highlight the most significant factual findings of the court below, and the relevant evidence supporting those findings, in conjunction with the Argument.

III. The District Court's Ruling

Granting standing to the plaintiffs as registered voters in North Carolina, the court below subjected North Carolina's redistricting plan to strict scrutiny because the General Assembly deliberately drew two majority-black districts. J.S. 34a, 110a. The court found as a matter of fact that the General Assembly had acted out of a desire to comply with Sections 2 and 5 of the Voting Rights Act. In addition, it found that some, though not a majority of legislators, acted out of a desire to remedy the "state's long and continuing history of race-discrimination in matters of voting." J.S. 108a. The court held that the state had a compelling interest in complying with the Voting Rights Act because there existed a strong basis in evidence for concluding that enactment of a plan with two majority-black districts was necessary to avoid a violation of Sections 2 and 5 of the Voting Rights Act. J.S. 111a. The court also held that the state would have a compelling interest in remedying the effects of past or present racial discrimination, even absent a violation of the Voting Rights Act. J.S. 55a-57a.

Applying the five basic factors used to determine whether a race-based affirmative action program is narrowly tailored, the court held that the state established that the

remedial districts are narrowly tailored to serve the state's compelling interest in complying with the Voting Rights Act while also providing fair and effective representation to all of the state's citizens. J.S. 113a-114a.

SUMMARY OF ARGUMENT

(a) None of the Shaw plaintiffs in this case have standing to challenge the First District, following *United States v. Hays*, 115 S.Ct. 2431 (1995), because they do not live in the First District and have not demonstrated that they have been subjected to racially discriminatory treatment as a result of the creation of that district. Similarly, the Pope plaintiff-intervenors do not have standing to challenge the First or Twelfth Districts because none of them resides in either of those districts. They have not alleged, much less proven, any personal injury that they have suffered as a result of those districts's creation.

The two plaintiffs who live in District 12 do not have standing to challenge that district because they do not allege that they were placed in the district on the basis of the color of their skin. In fact, based on the findings of the court below, they have failed to prove that they have suffered any legally cognizable harm. Instead, the plaintiffs' allegations of harm were "abstract, speculative and merely theoretical". J.S. 21a. Such assertions are insufficient to "demonstrat[e] the individualized harm our standing doctrine requires." *Hays*, 115 S.Ct. at 2436.

(b) North Carolina's congressional redistricting plan should not be subject to strict scrutiny because racial factors did not predominate over all other redistricting goals. The court below made factual findings that the shape, location and composition of the challenged districts resulted from the interplay of six different factors, of which race was only one. J.S. 109a. Applying the standard subsequently articulated in *Miller v. Johnson*, 115 S.Ct. 2475 (1995), to the district court's well-supported findings of fact, the state here defeated the

plaintiffs' claim that District 12 was drawn solely on the basis of race by showing that several factors other than race played a significant role in the decisions about how to fashion the redistricting legislation. *See Miller*, 115 S.Ct. at 2488. Since the district court found that recognizing communities of interest, protecting incumbents, and satisfying several other non-racial goals were not subordinate to racial considerations, plaintiffs' equal protection rights have not been implicated and the plan need not satisfy strict scrutiny.

(c) Although this Court does not need to subject Districts 1 and 12 to strict scrutiny, the fact remains that both districts are justified by three different compelling state interests. First, North Carolina had a compelling interest in complying with Section 2 of the Voting Rights Act because all of the threshold factors required by *Thornburg v. Gingles*, 478 U.S. 30 (1986), and explicitly applied to single-member districts in *Growe v. Emison*, 113 S.Ct. 1075, 1084 (1993), were present with regard to North Carolina's congressional districts. Anything less than two majority-black congressional districts would have diluted the voting strength of black voters and denied them an equal opportunity to elect candidates of their choice to the U.S. Congress. Several plans introduced during the legislative process and at the trial of this case demonstrated that it is possible to draw two very regularly-shaped majority-black congressional districts in North Carolina. The evidence was uncontradicted that racially polarized voting exists to such an extent that the candidate of choice of black voters usually is defeated. State legislators debated the meaning of Section 2, and were well aware of the potential liability during the redistricting process.

Second, North Carolina had a compelling interest in complying with Section 5 of the Voting Rights Act because, after conducting its own independent review of the facts, the General Assembly reasonably concluded that the Justice Department's objection to the first plan they passed was not without merit. Unlike the experience in Georgia, the Justice

Department's objection in North Carolina was not based on the state's failure to maximize the number of majority-black districts in the state. Indeed, it is possible to draw three majority-black districts in North Carolina. Rather, the Justice Department concluded that the state's decision to protect incumbents at the expense of creating a second majority-black district might be evidence of purposeful racial discrimination.

Third, the state had a compelling interest in remedying the effects of current racial discrimination in voting patterns and campaign tactics, and ameliorating historical discrimination in previous congressional redistricting that intentionally fragmented the voting strength of black voters. The legislature was aware of the many historical and current barriers to black voters' participation in the political process and had a compelling interest in providing effective representation to the 22% of the state's citizens who had been purposefully disenfranchised in the past.

(d) Districts 1 and 12 are narrowly tailored to appropriately remedy the vote-dilution harms experienced by African-American voters without unduly burdening the rights of third parties. A district's lack of geographic compactness is relevant to the threshold question of whether race predominated in the redistricting process, but has no relevance to the question of whether a redistricting plan is narrowly tailored because there is no constitutional or statutory requirement in North Carolina that congressional districts be geographically compact.

ARGUMENT

I. THE PLAINTIFFS FAILED TO ESTABLISH THAT THEY HAVE STANDING

(a) In the district court the plaintiffs asserted that "[a]ny registered voter in North Carolina ... has standing to

object" to any unconstitutional congressional district.[3] Ruling prior to this Court's decision in *United States v. Hays*, 115 S.Ct. 2431 (1995), the district court sustained this sweeping claim:

> [A]ny person registered to vote in a jurisdiction with a districting plan that contains one or more [allegedly unconstitutional] districts ... has standing to challenge that plan, even if he is not assigned to vote in one of those districts himself.

J.S. 25a-26a. In *Hays*, however, this Court unanimously rejected this very argument. The plaintiffs there also asserted that every voter in Louisiana could challenge the constitutionality of any district.

> We ... reject appellees' position that "anybody in the State has a claim" ... The fact that Act 1 *affects* all Louisiana voters by classifying each of them as a member of a particular congressional district does not mean -- even if Act 1 inflicts race-based injury on *some* Louisiana voters -- that *every* Louisiana voter has standing to challenge Act 1 ...

Hays, 115 S.Ct. at 2435-37 (emphasis in original). Particularly telling for the claim of the *Hays* plaintiffs was that none of them lived in District 4, the district purportedly created in an unconstitutional manner.

Hays is manifestly fatal to the purported standing of any of the plaintiffs here to challenge in this case the constitutionality of District 1. Here, as in *Hays*, none of the plaintiffs actually lives in District 1.[4] *Hays* is equally

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[3]Complaint at 13 (March 12, 1992), J.A.1.

[4]Plaintiffs Shaw and Shimm live in District 12. Plaintiffs Robinson Everett, James Everett and Dorothy Bullock are residents of District 2. Complaint at 4 (March 12, 1992), J.A. 1. Of the plaintiff-intervenors, two live in District 4, three live in District 6, one lives in District 9, and five are residents of District 10. Motion of James Arthur Pope, et al., to

dispositive of *all* claims of the Pope plaintiff-intervenors, since none of those plaintiffs lives in either District 1, or in the other challenged district, District 12.

(b) Two of the Shaw plaintiffs live in District 12. While residence in a challenged district is necessary to establish standing, it is not by itself sufficient. In order to establish standing, "this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Thus, the Court stressed in *Hays* that the plaintiffs there were obligated to demonstrate that they personally had been placed in a disputed district because of their race: "[A]ppellees' argument that "they *do* have a right not to be placed into or excluded from a district because of the color of their skin" ... cannot help them, because they have not established that *they* have suffered such treatment in this case." 115 S.Ct. at 2437 (emphasis in original); see *id.* at 2437 (plaintiffs must establish that they have "*personally* been denied equal treatment") (emphasis in original). *Hays* observed that establishing standing "may not be easy in the racial gerrymandering context, as it will frequently be difficult to discern why a particular citizen was put in one district or another." 115 S.Ct. at 2436.

The Shaw plaintiffs assert that the state engaged in "flagrant use of race to classify voters." Brief of Appellants Shaw et al., On the Merits, [hereinafter "Shaw Br."] at 22. But the particular voters whom plaintiffs assert were so classified were not the white plaintiffs in this case, but some portion[5] of the *black* voters in District 12. The Shaw plaintiffs

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Intervene as Plaintiffs at 3-5 (September 13, 1993), J.A. 10.

[5]Given the size and distribution of North Carolina's non-white population, thousands of black voters would inevitably have been assigned to an urban 12th District even if the district had been drawn without regard to race.

do not assert that they or any other white voters were "placed into ... district [12] because of the color of their skin." Rather, plaintiffs assert that whites were mere "filler people" (Shaw Br. 22), added to District 12 because they happened to reside in neighborhoods included in District 12 to assure that it was geographically contiguous. Plaintiffs do not claim that the state determined to include in District 12 a particular number of *white* voters, and then assigned plaintiffs to that district because of their race. Rather, plaintiffs assert that they are in District 12 "in spite of," not "because of," their race. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

Hays does not, of course, hold that white residents could never have standing to challenge a deliberately created majority-black district. Such plaintiffs would have suffered a violation of their own right to non-discriminatory treatment if, in violation of the Constitution, whites had been allocated to the district on the basis of race. But this is simply not such a case. The only individuals whom plaintiffs asserted had been assigned to District 12 on the basis of race are black voters. The decisions of this Court preclude plaintiffs from maintaining this action to enforce the rights of such third parties.

(c) In order to establish standing a plaintiff must also demonstrate that the asserted violation actually caused him "injury in fact", a harm which is "concrete and particularized, and ... actual or imminent, not conjectural or hypothetical." *United States v. Hays*, 115 S.Ct. at 2435.

In *Shaw v. Reno*, this Court identified two distinct harms that might be caused by race-based districting. First, the Court observed that such districting "*may* exacerbate ... patterns of racial bloc voting...." *Id.*, 113 S.Ct. at 2827 (emphasis added). *Shaw* also stressed that the existence of such "racial bloc voting ... can never be assumed, but specifically

must be proved in each case." 113 S.Ct. at 2830.[6] Second, the Court noted that where certain race-based districts exist "elected officials are more likely to believe that their primary obligation is to represent" a particular racial group. *Id.*, 113 S.Ct. at 2827.[7] *Hays* recognized that such injuries were a *possible* consequence of race-based districting, but no more than that. Thus, the Court observed that "[v]oters in such districts *may* suffer the special representational harms racial classifications can cause in the voting context." 115 S.Ct. at 2436 (emphasis added). *Hays* stressed that plaintiffs had standing only if *inter alia*, "they have alleged and proven the injury discussed in *Shaw*." 115 S.Ct. at 2437.

The court below observed that the plaintiffs had "not even alleged, much less proved," such concrete injuries. J.S. 21a. Plaintiffs offered no evidence whatsoever that patterns of bloc voting had changed, for good or for ill, since the 1991 enactment of the districting plan in question. The district court found no evidence of any adverse effect on the citizens' interests in effective representation (J.S. 105a[8]), and noted

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[6]*See also Growe v. Emison*, 113 S.Ct. at 1084; *Voinovich v. Quilter*, 113 S.Ct. 1149, 1158 (1993).

[7]*See also Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (court "cannot presume ... without actual proof" that winning candidate will ignore the interests of any group of voters); *White v. Register*, 412 U.S. 755, 767 (1973) (evidence demonstrated representational injury).

[8]The candidates in the challenged districts were able to learn which voters are in their districts, and campaign effectively. Tt. 926-29; Ex. 515; Watt Dep. at 27-31, 53-54; Ex. 502, Clayton Statement at 3-4; Watt Statement at ¶ 14. Similarly, voters were able to learn which districts they live in. Voters in each of the counties in the 12th Congressional district, except for Rowan and Iredell counties, receive voter cards from their county board of elections which indicate their congressional district. Tt. 949-50; Ex. 509-510; J.A. 646-649, Ex. 502, Statements of R. Leeper and E. Emerson.

uncontroverted evidence that the representatives from the lst and 12th congressional districts "had been called upon and had responded more frequently during their terms to requests for services and expressions of views by white than African-American constituents." J.S. 106a n.59. Plaintiffs conceded that they were personal acquaintances of the 12th District Representative, had actually voted for him, were long-time activists in his party, and had never made any unsuccessful efforts to sway his votes or obtain his assistance.[9] The court below concluded that the plaintiffs' "voting rights have been in no legally cognizable way harmed by the plan." J.S. 115a.

The district court mistakenly reasoned, however, that the plaintiffs could establish the requisite harm merely by adding, in their trial court pleadings, "a claim of ... stigmatic injury." J.S. 23a. On the view of the lower court, plaintiffs were under no obligation to adduce any evidence in support of such a claim; rather, it reasoned, the courts are to conclusively presume that such injuries "necessarily" occur whenever there is a violation of equal protection. J.S. 22a. While racial classifications may often cause stigmatic harm, that harm is to the individuals so classified, not to curious bystanders; plaintiffs do not and could not plausibly claim that they were assigned to District 12 on account of their race.

Watt and Clayton have established numerous offices throughout their districts, and utilize mobile offices, toll-free telephone numbers, extended office hours, and various other procedures to make them accessible to constituents. Ex. 502, Clayton Statement at 4-5; Watt Statement at 16. Both representatives make concerted efforts to keep in touch with community leaders, communicate with their constituents through newsletters, J.A. 664-72, community forums and town hall meetings, provide constituent services, and respond to constituent mail. Ex. 502, Statements of Clayton, Watt, Emerson, Lambeth, McGovern, and Offerman.

[9]Shaw Dep. at 7-10, Shimm Dep. at 8-9, 12-13, 39.

With regard to a claim of stigmatic injury, as with any other element of standing, "[t]he party invoking federal jurisdiction bears the burden of establishing" the relevant facts. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

> Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e. with the manner and degree of evidence required at the successive stages of the litigation.

Id. The only evidence adduced by plaintiffs was the vague testimony of two plaintiffs that they felt "disenfranchised." The district court dismissed that testimony as "abstract, theoretical, and merely speculative, not concrete and palpable; [it has] the marks of the sort of 'injury in perception' rather than 'in fact' ... that the Supreme Court has previously found insufficient to confer Article III standing." J.S. 22a.[10] That finding is fatal to plaintiffs' assertion of a cognizable emotional injury.

The real gravamen of plaintiffs' opposition to District 12 appears to be that they strenuously object to being in a congressional district in which black voters are, for whatever reason, a majority and in which the successful congressional candidate is non-white.

> [W]e contend that an African-American congressperson in *any* majority-minority district will be induced, consciously or unconsciously, to represent their white constituents less effectively and with less concern than their black constituents.[11]

Plaintiffs maintain that they and other white constituents will be ignored unless their district has either a white majority or a white representative.[12] These racial views, however earnestly adhered to by plaintiffs, were not shared by the framers of the Fourteenth and Fifteenth Amendments. The First Amendment, to be sure, protects the right of plaintiffs or any other person to hold and voice objections to being represented by a member of Congress who is black, hispanic, Asian, or Native American, or to take offense at being placed in a district with a non-white majority. But neither the fact that white voters no longer control the outcome of congressional elections in the Twelfth District of North Carolina, nor the fact that the last election in that district was won by a black candidate, states a cognizable injury under the Equal Protection Clause.

II. THE DISTRICT COURT APPLIED AN ERRONEOUS LEGAL STANDARD IN DETERMINING WHETHER NORTH CAROLINA'S REDISTRICTING PLAN

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[10]The Shaw appellants, quoting this Court's opinion in *Shaw*, assert: These districts "stigmatize individuals by reason of their membership in a racial group and ... incite racial hostility." [*Shaw*, 113 S.Ct.] at 2824. Shaw Br. at 21. In *Shaw* itself, however, the quoted passage is preceded by the words "threaten to", and refers, not to these or any other congressional districts, but to racial distinctions in general. *See also Shaw*, 113 S.Ct. at 2824 (race conscious measures "*may* ... stimulate ... race-consciousness") (emphasis added).

[11]Plaintiffs' Responses to defendants' Third Set of Written Interrogatories, at 11 (Emphasis added); J.A. 679-80. Such insupportable sweeping racial accusations fall far short of the particularized proof required by *Hays* and *Shaw*. In fact, these allegations are the very sort of stereotypes condemned by this Court in *Shaw*.

[12] Plaintiffs attempt to substantiate this position with nothing in the record other than purported testimony by Congressman Watt which they mischaracterize and quote out of context. *Compare* Shaw Br. at 21 n.18 *with* J.A. 511-513.

SHOULD BE SUBJECT TO STRICT SCRUTINY.[13]

(a) The threshold legal issue faced by the district court below concerned the appropriate legal standard to be applied in determining whether a redistricting plan should be subjected to strict scrutiny. The lower court concluded that strict scrutiny must be applied whenever race had played *any* "'motivating' . . . role in the line-drawing process." J.S. 34. Strict scrutiny was required, it insisted, regardless of the extent to which factors other than race might have played an equally or even more significant role in the process. J.S. 26a, 34a. The district court recognized that this rule would require application of strict scrutiny to virtually all districts in the country created to comply with Sections 2 or 5 of the Voting Rights Act, J.S. 37a n.20, and candidly justified the rule as a device to make states hesitate before agreeing to "voluntary compliance with the Voting Rights Act." J.S. 38a.

Shortly after the district court decision in the instant case, the district court in *Miller v. Johnson* rejected that sweeping standard. *See Johnson v. Miller*, 864 F. Supp 1354, 1372 (S.D.Ga. 1994). The Georgia three-judge court held, instead, that strict scrutiny should be limited to redistricting plans whose "predominant" and "overriding" purpose was racial. *Id.* The *Miller* district court expressly disapproved the far broader standard applied by the district court here, reasoning that such a rule would necessitate exacting and intrusive judicial scrutiny of an enormous number of redistricting plans, including virtually any plan adopted by states or localities mindful of their obligations under the Voting Rights Act. 864 F. Supp at 1373.

[13]The court framed the threshold issue as follows: "whether the congressional redistricting plan reflects a legislative intent deliberately to include one or more districts having a particular racial composition of voters." J.S. 84a, n.54.

In *Miller v. Johnson* this Court expressly adopted the narrower standard articulated by the Georgia district court:

> The plaintiff's *burden* is to show . . . that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff *must* prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations. Where . . . race-neutral considerations . . . are not subordinated to race, a state can "defeat a [plaintiff's threshold claim]."

115 S.Ct. at 2488 (emphasis added).[14]

The standard applied by the district court below was manifestly inconsistent with this Court's subsequent decision in *Miller*. As Justice O'Connor observed in *Miller*, "the threshold standard the Court adopts . . . [is] a demanding one," limited to "extreme instances of gerrymandering." 115 S.Ct. 2497 (concurring opinion). Because the court below utilized an incorrect legal standard in determining whether strict scrutiny applies to North Carolina's redistricting plan, that determination cannot stand.

(b) Whether race (or any other factor) was the "predominant, overriding" consideration in a redistricting plan is, of course, a factual question. A trial court's resolution of that issue is a "factual finding," *Miller*, 115 S.Ct. at 2485, subject to review in this Court only for "clear erro[r]." *Id.*, 115 S.Ct. at 2488. The plaintiffs urge this Court to undertake its own evaluation of the complex and voluminous record in

[14]See *id.* at 2485 ("the overriding and predominant force"; "the predominant, overriding force"), 2486 ("the . . . . dominant and controlling rationale"), 2488 ("predominates"), 2489 ("predominant, overriding desire"; "the predominant factor"; non-racial factors "subordinated to racial objectives"), 2490 (non-racial factors "subordinated to racial tinkering"; "the predominant, overriding factor.")

this case, and to decide de novo whether the factual showing required by *Miller* was made in the trial court.[15] But this Court does not sit to resolve, *de novo* or *nisi prius*, such fact-bound questions.

Ordinarily the district court's error with regard to this threshold legal standard would require a remand of this case for appropriate factual findings utilizing the correct legal standard. *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 2118 (1995); *Furnco Construction Co. v. Waters*, 438 U.S. 567, 580 (1978). In the instant case, however, the district court's lengthy opinion contains specific factual findings which are dispositive under the *Miller* standard.

First, the district court concluded that neither race nor any other single consideration was the "predominant, overriding" factor behind the contours of Districts 1 and 12. Rather, it held,

> the . . . locations and . . . shapes of the two districts resulted from *a combination of factors* that influenced legislative choices: [1] the equal-population requirements . . .; [2] the need for effective African-American voting majorities; [3] the legislative intention to create one predominantly rural (First) and one predominantly urban (Twelfth) district . . .; [4] the intention to create two districts with distinctive and internally homogeneous commonalities of interest; [5] incumbent protection; and [6] the maintenance of technical territorial contiguity.

J.S. 109a (emphasis added). The court observed as well that the desire of the Democrat-controlled state legislature to favor Democrats played a decisive role both in the legislative process

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[15]Pope Br. 17 n.7 ("appellants have comfortably carried that burden in this case"), 17-18 (summarizing evidence relied upon by appellants); Shaw Br. 19-20 and n.16 (summarizing evidence relied upon by appellants).

and in determining the shape and location of the districts.[16] The lower court made detailed factual findings regarding how this "combination of factors", no one of them predominant over the others, had shaped the two districts in question. J.S. 97a-101a. In both instances, far from any single factor simply overriding, across the board, all other considerations, the interaction and balancing of the competing factors were "vastly complicated in detail." J.S. 97a.

Second, the district court found that most of the irregularities in the contours of the First and Twelfth Districts were the result, not of racial considerations, but of a desire to protect incumbents.[17] "Many oddities of shape resulted. A greater number can be laid most directly to incumbent protection."[18] In this respect incumbency protection, not race, was the factor that overrode any concern for compactness.[19] The district court also found that incumbency protection at times overrode efforts to include

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[16]J.S. 94a-96a (the "alternative [adopted] . . . favored . . . partisan Democratic interests . . . and . . . perfectly trumped the Republican-favored plan.")

[17]The critical role of incumbency protection in shaping Districts 1 and 12 is detailed, *inter alia*, at Tt. 106, 647-48, 1057; Ex. 200 at 617, 898; Ex 501, Report of Morgan Kousser, PhD., [hereinafter "Kousser Report"], at 70-71; Daughtry Dep. 14-15; Pope Dep. 103-111.

[18]J.S. 99a; see *id.* at 100a ("[o]ther examples of irregularities of shape driven largely by concerns for incumbent protection abound in the record"), 101a (use of double crossover to protect district of Republican incumbent.).

[19]The particular devices employed in this case were traditional North Carolina districting techniques. Double-crossovers and point contiguity had repeatedly been utilized by the state legislature prior to the enactment of Districts 1 and 12. Tt. 405, 414, 442-44; J.A. 543-45, 555; Cohen Dep. 72, 79-80.

adjacent minority neighborhoods in the two districts in question. For example,

> [t]hough the home precincts of both Congressman Valentine in Nash County in the existing Second District and of Congressman Lancaster in Goldsboro in the Third were heavily (45%) African-American and were geographically slated for ready inclusions in the First District, they were retained in their existing districts.

J.S. 99a.[20]

Third, the district court found that the legislature's desire to create distinctively rural and urban districts resulted in the exclusion of black areas from one or the other of those districts. Thus the black neighborhoods of Durham and Raleigh, originally included in the Coastal Plain district, were removed to

> accommodate an expressed desire of African-American legislators and citizens from the rural Coastal Plain area that the remedial district centered in that area should not include urban African-American populations . . . .

[20]See J.A. 369, 375. Similarly, black voters in Cabarrus County, although adjacent to the Twelfth District, were left in the district of incumbent Representative Hefner. J.A. 365-66; Watt Dep. 59-60. Majority black precincts in Forsyth County, which would naturally have been encompassed in the Twelfth District, were removed and placed in the Fifth District to help the Democratic incumbent, Steve Neal. J.A. 364-65, Tt. 367-72; Watt Dep. 60.

J.S. 96a.[21] Black representatives from the Coastal Plain themselves attached greater importance to creating a distinctively rural First District than to including in that district the large concentrations of black voters who lived in urban areas.[22] The district court concluded as well that the legislature's desire to make the First and Twelfth Districts, respectively, rural and urban, was "one of the very factors that indisputably contributed to their irregular shapes." J.S. 102a.[23]

Fourth, the district court held that the First and Twelfth Districts, as ultimately enacted, were

> not the most geographically compact majority-minority districts that could have been created were no factors other than equal population requirements and effective minority-race voting majorities taken into account.

[21]Removal of these areas meant that District 1 had a lower percentage of black population than the majority-black district in the state's first plan, Chapter 601. The black population dropped from 57.26% to 55.69%. *Compare* J.A. 545 *with id* at 551.

[22]In addition, rural black populations adjacent to District 12 were excluded from that district, and placed in majority-white districts, to maintain the urban character of the Twelfth. Tt. 352; Watt Dep. 59-60. Large portions of four rural counties near the Virginia border, (including Vance and Caswell counties, which are 45% and 40% black in population respectively, Ex. 578) had been included in District 12 in earlier proposals, but were removed to meet the 80% rural guideline. J.S. 100a.

[23]The record contains voluminous evidence detailing the desire expressed repeatedly *prior* to the framing of Districts 1 and 12 for the creation of distinctively rural and urban districts. J.A. 181, 182, 356-57, Ex. 200 at 76, 144, 191-92, 241, 287-88, 443-451, 454, 484, 493, 495-96, 504, 600, 603.

J.S. 108a-109a.[24]

That is, it was precisely because other race-neutral factors *were* taken into account, and not subordinated to racial considerations, that the districts were shaped in a particularly irregular manner.

These district court findings that race was only one of numerous considerations shaping the North Carolina plan doubtless rested as well on a singular fact that highlights a crucial distinction between this case and *Miller v. Johnson*. In the instant case, as in *Miller*, there was a proposal to create three majority black districts.[25] The three-district plan was introduced by the Republican members of the legislature, J.A. 249, 233, 269, 288-90, but was rejected on a party line vote by the Democratic majority. Stip. 92-94. The black Democratic legislators, subordinating racial concerns to an overriding interest in partisanship, voted against this plan to create a third majority-minority district. As a consequence, a majority of the black residents of North Carolina today are in majority-white districts outside of Districts 1 and 12.[26]

Plaintiffs, although insisting that race was the sole motivation behind the North Carolina redistricting plan, do not squarely take issue with any of these findings, let alone assert that the findings are clearly erroneous. Their current

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[24]See J.S. 102a (challenged districts "are not the two most geographically compact remedial districts that could have been drawn--if not other interests had been considered".) Republicans opposed the redistricting plan because, far from subordinating all other considerations to race, the plan was more irregular precisely because it furthered the non-racial purpose of protecting Democratic incumbents. J.A. 221, 226.

[25]Stip. Ex. 10, 95-100; Stip. 94.

[26]In the 1990 census, the black population of North Carolina was 1,456,323. (J.S. 82a). The combined black population of the First and Twelfth Districts is 629,081, or 43.2% of the state total. J.A. 551.

suggestion that race was the predominant purpose of the redistricting plan is flatly inconsistent with their contentions prior to this Court's decision in *Miller*. The Pope plaintiffs, for example, filed a separate action in 1992 alleging that the central purpose of the redistricting plan was not race, but political partisanship. *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992), *aff'd mem.* 113 S.Ct. 30 (1992). The Pope plaintiffs reiterated that contention in 1993 when they moved to intervene in the instant case.[27] Art Pope testified at the trial of this case that the location and shapes of the districts in Chapter 7 were due to "partisan gerrymandering." J.A. 525-533. In his deposition in this case, plaintiff Robinson Everett testified that Chapter 7 was "rammed down the throat of the legislature for the benefit of certain groups" including "a particular administration and perhaps a particular political party." R. Everett Dep. at 92. Plaintiffs' post-*Miller* bald assertions that race was the predominant motive behind the North Carolina redistricting plan are insufficient to overcome the District Court's express detailed findings to the contrary.

(c) Plaintiffs suggest that *Miller* contains no requirement that they establish that race was the predominant, overriding purpose of the challenged districts. The Shaw plaintiffs contend, for example, that "the reference in *Miller* to the 'predominant' and 'overriding' purpose of the Georgia legislature should not be viewed as *requiring* that a plaintiff satisfy [that standard]." Shaw Br. at 19, n.16. (emphasis added); *see* Pope Br. at 17, n.7. This contention is flatly inconsistent with the unequivocal language of *Miller* itself, which clearly specifies that "a plaintiff must *prove*" that the

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[27]The Pope plaintiffs alleged that "the General Assembly's goal was to protect or enhance the electoral possibilities of certain incumbents. In order to achieve this goal, the General Assembly concocted congressional districts with grossly contorted shapes with no logical explanation other than incumbency protection or enhancement of Democratic partisan interests." Complaint in Intervention at 11, (September 13, 1993).

legislature subordinated any non-racial considerations to a predominant racial purpose. 115 S.Ct. at 2488 (emphasis added).

To the extent that Miller imposed such a requirement, both appellants urge that *Miller* was wrongly decided. Shaw Br. at 19, n.16; Pope Br. 17, n.7. But plaintiffs offer no persuasive reason, indeed offer little argument at all, why this Court should overturn the *Miller* standard less than a year after that decision.

Miller properly stressed that the application of equal protection principles to redistricting is "a most delicate task," 115 S.Ct. at 2483, requiring a "circumspect approach." 115 S.Ct. at 2486. As the district court in *Miller* correctly recognized, strict scrutiny of *every* districting plan in which race played any role would inevitably extend to virtually every plan enacted in whole or in part to comply with Section 5 of the Voting Rights Act. *Johnson v. Miller*, 864 F. Supp 1354, 1373 (S.D.Ga. 1994). Similarly, since every plan passed in every city, county, and state with a significant non-white population had to comply with Section 2 of the Voting Rights Act, racial factors played some motivating role in those plans, and they would be subject to challenge. If this Court were to overturn *Miller* and apply strict scrutiny whenever any such racial purpose was present, such a standard would require court review of an overwhelming number of election districts.

The carefully framed standard in *Miller* serves, as Justice O'Connor observed, to avoid a construction of the Fourteenth Amendment which would quite literally discriminate against black voters. State legislators have long drawn district lines for the purpose of creating districts a majority of whose voters belong to a particular white ethnic or religious group. *Miller*, 115 S.Ct. at 2505 (Ginsburg, J., dissenting); *Mobile v. Bolden*, 446 U.S. 55, 88 (1980) (Stevens, J., concurring). During the 1993 *Shaw* argument, counsel for appellants urged this Court to establish for Polish or other

white ethnic districts a constitutional standard different and less stringent than that applicable to black districts.[28] But the Equal Protection Clause makes no such distinction, applying in the same manner to any "distinctions based on color and ancestry." *Hirabayashi v. United States*, 320 U.S. 81, 110 (1943). Indeed, the double standard earlier proposed by the Shaw appellants would be a racial one, because a deliberately created Polish, Irish or Italian district would necessarily, and every bit as deliberately, be a majority- white district. It is inconceivable that the Equal Protection Clause establishes a greater barrier to the deliberate creation of a black district than it does to the deliberate creation of an Italian or other white ethnic district. "[T]he driving force behind the adoption of the Fourteenth Amendment was the desire to end legal discrimination against blacks", not a scheme to constitutionalize it.[29] *Miller*, 115 S.Ct. at 2497 (O'Connor, J., concurring). The *Miller* standard avoids the creation of a double standard by expressly applying to all ethnic groups. 115 S.Ct. at 2497 (O'Connor, J., concurring). At the same time, by extending strict scrutiny only to those extreme cases in which all other factors are subordinated to race or ethnicity, *Miller* avoids sweeping into federal court the countless more

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[28] *See Shaw v. Reno*, No. 92-357, 1993 WL 751836 at 54-55.

[29] Automatic application of strict scrutiny to every instance of deliberate race-based districting would also result in a constitutional double-standard to the extent that favoring white incumbents is constitutional, but favoring black incumbents, where they receive a high level of support from black voters, would be subject to strict scrutiny. The Shaw plaintiffs, while voicing no constitutional objection to incumbency protection, argue that a plan drawn to assist a specific candidate who is black necessarily violates the Equal Protection Clause. *Compare* Shaw Br. at p. 15, n.14. *with* R. Everett Dep. at 95-96 (expressing the view that protecting incumbents is constitutional "if you take the race out of it" and only protect white incumbents).

mundane instances in which race or ethnicity was only one of several factors that combined to shape a particular district.

III. NORTH CAROLINA'S REDISTRICTING PLAN IS JUSTIFIED BY A COMPELLING STATE INTEREST IN COMPLYING WITH SECTION 2 OF THE VOTING RIGHTS ACT

Even if the strict scrutiny standard were to be applied, the court below was correct in upholding Chapter 7 against plaintiffs' constitutional challenge, because the state had a compelling interest in complying with the Voting Rights Act and in remedying the effects of current and past discrimination in voting and elections (as we show below)[30] and because the 1991 plan was narrowly tailored to further that interest (see § VI *infra*).

The court below found that the General Assembly enacted Chapter 7, among other reasons, in order to comply with Section 2 of the Voting Rights Act. J.S. 90a, 108a. That finding is not clearly erroneous[31] but rather is supported by overwhelming evidence on this record demonstrating (a) that the *Gingles* prerequisites for a Section 2 claim existed in North Carolina at the time of the 1991 redistricting; (b) that the "totality of the circumstances" strongly supported the conclusion that a plan that created fewer than two Congressional districts within which African-American voters could elect candidates of their choice would violate Section 2;

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[30]The *Gingles* defendants adopt the argument of the State (at pages 37-38 of the State Appellees' Brief) that the court below correctly interpreted and applied the burden of proof at the strict scrutiny stage of equal protection analysis.

[31]Deference must be given to the trial court's findings of fact so long as there is evidence to support them. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1984). *See also Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982) (clearly erroneous standard applies to ultimate facts and the subsidiary findings upon which they are based).

and (c) that the North Carolina General Assembly was aware of and actually considered these factors in 1991.

A fortiori, the General Assembly had "a strong basis in evidence" for concluding that an apportionment plan with less than two such districts would succumb to a Section 2 challenge. *See Miller*, 115 S. Ct. at 2491, *citing City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500-01 (1989) and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276-77 (1986) (plurality opinion); *Voinovich v. Quilter*, 113 S.Ct. at 1156 (state is not required to make contemporaneous findings of actual discrimination or of a Section 2 violation before enacting redistricting plan that remedies vote dilution).[32]

(a) Each of the three *Gingles* factors necessary to demonstrate vote dilution are met with regard to North Carolina's congressional districts. In *Johnson v. DeGrandy*, 114 S.Ct. 2647 (1994), and *Growe v. Emison*, 113 S.Ct. 1075 (1993), this Court confirmed that the "three now-familiar *Gingles* factors" are the preconditions for demonstrating that a single-member district plan dilutes the voting strength of black voters

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[32]The plaintiff-intervenors rely exclusively on a memorandum submitted by the state to the Justice Department during the preclearance process to support their assertion that, in fact, the General Assembly did not believe that Section 2 of the Voting Rights Act required the creation of two majority-black districts in North Carolina. Pope Br. at pp.31-34 The court below was correct to conclude that the fact that the state initially defended Chapter 601 in seeking its preclearance, does not mean that it did not have a substantial basis in fact for later concluding that Chapter 601 would likely violate the Voting Rights Act. J.S. 112a. If the candidates of choice of the black community were being elected to Congress in numbers roughly proportional to their share of the state's voting-age population as a whole, that may be evidence that the state was not in fact motivated by a desire to comply with Section 2 of the Voting Rights Act. *See Johnson v. DeGrandy*, 114 S.Ct. 2647, 2661 (1994). However, the fact that the state first vigorously defended its initial -- and inadequate -- redistricting plan does not preclude it from later determining that the plan probably did violate the Voting Rights Act.

in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973(b). *DeGrandy*, 114 S.Ct. at 2657. *Gingles*, 478 U.S. at 46-47. The court below found that each of those preconditions is present with respect to North Carolina's congressional districts.

(1). White bloc voting. The court below found that the pervasive and persistent refusal of white voters in North Carolina to vote for black candidates has consistently operated to deny black voters an equal opportunity to elect candidates of their choice. J.S. 93a. This finding was supported by factual analysis of both congressional[33] and other statewide elections in North Carolina.[34] As the state's expert witness concluded, "[t]he polarized voting found in *Thornburg v. Gingles* is not a phenomenon of the past; it remains prevalent in the state today." J.A. 597.

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[33]None of the black candidates who ran for Congress in North Carolina in four elections during the 1980's obtained enough white votes to win a primary election, even if they had overwhelming support among African Americans. See J.A. 580-81 (report of Dr. Richard Engstrom) ("[C]ongressional elections in North Carolina have been marked by a persistent pattern of racially polarized voting").

[34]A study of 50 recent elections in which voters have been presented with a choice between African-American and white candidates, including elections for the U.S. House of Representatives, statewide elections to high profile and low profile offices, and state legislative elections in both single-member and multi-member districts, found that 49 of them were characterized by racially polarized voting. J.A. 596. Indeed, *every* statewide election since 1988 where voters were presented with a biracial field of candidates has been marked by racially polarized voting. In all except two low-profile contests, racially polarized voting was sufficient to defeat the candidate chosen by black voters. J.A. 581-585. Of every biracial state legislative district election since 1988, only one was not marked by racially polarized voting. The one exception was a 1992 multi-seat election in which African-American candidate Mickey Michaux received more white votes than two white challengers from the Libertarian Party. J.A. 585-91.

(2). Political cohesion of black voters. The court below held that it was undisputed that the African-American population is politically cohesive, J.S. 93a. In addition to the evidence that black voters overwhelmingly support the same candidates, J.A. 575, this finding is supported by evidence about the similarity of political opinions among blacks in North Carolina, J.A. 604-605, and testimony of witnesses about the shared experiences that provide the substantive basis for this considerable unity in political views. J.A. 643-659; Ex. 502, Statements of Albright, Harris, Michaux, Leeper, Ballance, Newell, Sears, D. Blanks, and Smallwood.

(3). Size and compactness of the black population. The court below held that:

> The overwhelming evidence established that the state's African-American population was sufficiently large and geographically compact to constitute a majority in two congressional districts; numerous examples of plans drawing two majority-minority districts were presented to the court, including several prepared by the Plaintiff-Intervenors in which the majority-minority districts themselves were "geographically compact" under any reading of *Gingles*.

J.S. 93a (record citations omitted). This conclusion follows from the subsidiary finding that in North Carolina there are "major, discrete concentrations of African-American population . . . the most significant ones of which, reflecting historical forces dating from slavery, are in the Coastal Plain and the Piedmont," J.S. 83a,[35] and the fact that it is actually

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[35]*See also* Keech & Sistrom, *North Carolina*, in Quiet Revolution in the South 156 (C. Davidson & B. Grofman eds., 1994) [hereinafter "Keech & Sistrom"] (North Carolina's black population is concentrated in the historical black belt in the eastern section of the state and in the urban areas of the Piedmont).

possible to draw *three* majority-minority congressional districts in North Carolina, one such plan having been introduced during the legislative process, *see* J.A. at 289-90.

The plaintiffs, however (Shaw Br. at 28-30), ask this Court to disregard the findings below, citing only a newspaper article and asserting that one of the remedial district proposals made *by plaintiff-intervenors* involved a "plurality-black" district that would be insufficient to meet the *Gingles* threshold requirement, rather than a majority-black district. In fact, evidence presented at trial demonstrated that the Charlotte to Robeson County district in the "Shaw II" plan (District 3), although it would have disregarded state policy by combining urban and rural populations with very different interests and needs, *see* J.A. 287, 381, Tt. 828-29, 945-46, arguably would give the African-American voters in the district the opportunity to elect candidates of their choice.[36]

Appellants' arguments[37] that the black population was not sufficiently "compact" to meet the Section 2 prerequisite also fail because the *Gingles* compactness requirement, 478 U.S. at 50, relates to the dispersion of the minority community rather than to the shape of a remedial district. The precondition inquires whether the minority population is sufficiently compact geographically to be included within a district; it is not a requirement that such a district be of any particular shape or regularity.

Thus, for example, if there were complete residential integration within a state, then the minority community would not be geographically compact and it would simply be

[36]The evidence indicated that candidates supported by the African-American community in Robeson County were on occasion able to attract sufficient Native-American crossover votes to secure election. See J.A. 596.

[37]Shaw Br. at 28-30; Pope Br. at 36-38.

impossible to draw a district in which the minority voters were in the majority. *See Gingles*, 478 U.S. at 50 n.17. On the other hand, if there are residential concentrations of African-American voters in sufficient numbers to be included within a district, the district does not have to be geographically regular but need only allow for effective representation. *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1465-66 (M.D.Ala. 1988). *See also Neal v. Coleburn*, 689 F. Supp. 1426 (E.D.Va. 1988); *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D.Ark. 1989).[38]

Thus, the findings of fact of the court below establish that each of the *Gingles* preconditions is met in North Carolina. Once those preconditions are satisfied, the vote dilution analysis requires an examination of the totality of circumstances to determine whether or not black voters have an equal opportunity to participate in the political process and elect candidates of their choice. 42 U.S.C. § 1973(b); *Johnson v. Degrandy*, 114 S.Ct. at 2647; *Gingles*, 478 U.S. at 43.

[38] In this respect, the use of the term "compact" in the first *Gingles* prong differs from its use in *Shaw v. Reno*. There, compactness is used in the sense of geographic regularity. Irregular districts, under *Shaw*, can provide evidence of an equal protection violation. This also explains why, during the preclearance process, the Justice Department may have stated that the shape of the districts does not matter. Not only is compactness not constitutionally required, it is neither a federal statutory requirement in the redistricting process, see 2 U.S.C. § 2(c), nor a State constitutional or statutory requirement. Stip. 20. Although from 1901 to 1922 federal law imposed a compactness requirement on congressional districts, since 1929 Congress decisively has rejected repeated efforts to reimpose compactness requirements on the reapportionment process. *See Wood v. Broom*, 287 U.S. 1, 7 (1932). Unsuccessful bills which would impose a compactness requirement have regularly been introduced. *See, e.g.*, H.R. 2648, 82nd Cong., 1st sess. (1951); H.R. 970, 89th Cong., 1st sess. (1965); H.R. 2508, 90th Cong., 1st sess. (1967). The Justice Department would have no authority to require a state to draw compact congressional districts.

(b) An analysis of the totality of circumstances shows a Section 2 violation. Here we highlight only the most salient evidence that supports the conclusion that a congressional districting plan such as that embodied in Chapter 601 would have violated Section 2.

(1). Political campaigns in North Carolina have continued to involve intentionally discriminatory tactics and racial appeals. North Carolina elections since this Court's ruling in *Gingles* have often involved campaign tactics deliberately and demonstrably designed to keep African-Americans from voting. Most significantly, in 1990, just days before the general election in which black candidate and former Charlotte Mayor Harvey Gantt opposed U.S. Senator Jesse Helms' reelection, black voter turnout was reduced by a misleading and intimidating postcard mailing.[39]

Racially polarized white bloc voting against African-American candidates is exacerbated by explicit or subtle racial appeals during political campaigns. The most notorious recent examples of racial appeals in North Carolina campaigns also

[39]Post cards entitled "Voter Registration Bulletin" were mailed to 125,000 African-American voters throughout the state. The "Bulletin" suggested, incorrectly, that individuals could not cast ballots if they had moved after registering but less than 30 days before the election, and suggested that attempts to do so might result in criminal prosecution. See J.S. 93a-94a, n. 57; J.A. 673-74; Ex. 526, Consent Order in *United States v. North Carolina Republican Party*, No. 91-161-CIV-5F (E.D.N.C. February 27, 1992); Tt. 1011. The postcards were sent to black people who had lived at the same address for years, Ex. 502, Statements of Foxx, Harris, & Simpkins, and caused widespread confusion among black voters about whether or not they could vote. *Id.* Statements of Burts, Johnson, Emerson, Watt; J.A. 495-96.

come from the Gantt-Helms contest in 1990. J.S. 93a.[40] However, there are other examples of explicit racial appeals in political messages of the early 1990's at the state and local levels. J.S. 93a; J.A. 612-20; Ex. 505; Tt 1011. The overall effect of such racial appeals "has been to diminish seriously the opportunities of black citizens for an equal exercise of their political rights." J.A. 621.[41]

(2). The continuing effects of past discrimination keep black voters from participating effectively in the political process. Current forms of racial discrimination in matters affecting voting are all the more effective because of the long history of official and purposeful discrimination which ended in some areas of the state less than twenty years ago. The initial demise of black political participation following Reconstruction as a result of the "White Supremacy Campaign" of 1898 and North Carolina's adoption of literacy tests and poll taxes is described in the Brief of the Congressional Black Caucus as *Amicus Curiae* in Support of Appellees. Only 15% of the state's blacks were registered to

[40]Television ads which distorted Harvey Gantt's picture and voice, and others which were specifically designed to encourage racial stereotypes and fears "had a dramatic impact on the 5% to 6% of the electorate which the polls indicated had been 'undecided'." Ex. 502, Statement of Melvin Watt. *See also* J.A. 619. After the ads ran, polls showed that virtually all of the undecided voters voted for Jessie Helms. *Id.*

[41] Specific polls conducted in the 1990 election report substantial numbers of white North Carolinians who said they would simply not vote for a black candidate. Ex. 501, Report of Alex Willingham, Ph.D. at 20. A focus group study of the ads in the Gantt-Helms campaign showed how this series of ads effectively primed voters to react with negative racial characterizations. *Id.* at 22.

vote in 1948, and only 36% in 1962. Kousser Report at 30.[42]

As black voter registration increased,[43] other official forms of discrimination were enacted, including numbered seat requirements, anti-single shot provisions, and at-large and multi-member districts. *See Gingles v. Edmisten*, 590 F. Supp 345, 359-64 (E.D.N.C. 1984); Krech & Sistrom, at 162. North Carolina did not elect a black state legislator until 1968, and it refused at that time to abolish multimember districts for the state legislature. In 1967 the North Carolina General Assembly passed a numbered seat system, subsequently declared unconstitutional because it denied equal protection to black voters.[44] *See Dunston v. Scott*, 336 F. Supp 206

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[42]After passage of the Voting Rights Act, the percentage of eligible blacks registered to vote passed 50% for the first time since 1900. Kousser Report at 30. However, use of the literacy test continued until the early 1970's and is still a vivid memory for many older black voters, Ex. 502, Statements of J. Sears, O. Blanks, A. Ballance, some of whom still express the belief that they cannot register if they are unable to read or write. See Ex. 502 Statement of J. Burts, special registrar in Charlotte, N.C.

[43]In 1970, 52.2% of the black voting age population was registered to vote. In 1980, only 51.3% of age-qualified blacks were registered, whereas that same year 70.1% of the age-qualified whites were registered. J.A. 300. By 1993, the gap between white and black registration rates statewide had closed to slightly over ten percent, with 61.3% of the black voting age population registered, and 72.5% of the white voting age population registered. J.A. 300.

[44]The same legislature that adopted the multimember districts and numbered seat system also refused to add Durham County to the Second Congressional District because it would allow too great a black voter influence in that district. See discussion *infra* at pp. 41-42; Kousser Report at 31, 34-46; J.A. at 621-22.

(E.D.N.C. 1972). Multimember state legislative seats in areas where they diluted the votes of black voters were not eliminated until after this Court's decision in *Thornburg v. Gingles*.

(3). Black candidates have not been elected to public office to any significant extent. At the time the North Carolina General Assembly was considering the plan at issue here, "African-Americans were still not being elected to political office in the state in numbers even remotely approaching their representation in the general population, despite the fact that capable and experienced African-American candidates were running for election." J.S. at 92a. No candidate who was the choice of the black community had ever won election to a statewide non-judicial office since 1900. D.I. Stip. 79. No African-American had been elected to Congress from North Carolina during the same period. J.S. 115a. Although some candidates of choice of the state's African-American voters had been elected to public office from single-member districts where black voters were in the majority, the relative percentages of black elected officials in North Carolina in the early 1990's had actually not increased over those present in 1984 when the district court in *Gingles* considered this factor as relevant to the totality of circumstances inquiry in a vote dilution claim.[45]

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[45]*Compare Gingles v. Edmisten*, 590 F. Supp. at 365 (Blacks hold 9% of city council seats, 7.3% of county commission seats; 4% of sheriff's offices, 9.2% of the state House; 4% of the state Senate) *with* D. I. Stips. 76-80 (in 1989 Blacks held 8.1% of all elected offices; 8.8% of the state legislative seats; 6.9% of county commission seats; 4% of sheriff's offices). *See also*, 42 U.S.C. § 1973(b) ("The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered").

(4). Black voters in North Carolina bear the effects of past discrimination in education, employment and health which hinder their ability to participate effectively in the political process. Equal political participation of African-American voters in North Carolina is further impeded by the fact that they continue to suffer from a disproportionately low position on virtually every measure of socio-economic status. J.S. 92a. There is a significant history of official discrimination in education, housing, employment and health services in the state, documented in *Gingles*, 590 F. Supp. at 361, 478 U.S. at 64, which has resulted in blacks as a group having less access to transportation and health care and in their being less well-educated, lower-paid, and more likely to be in poverty and to

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In the state House of Representatives, which has 120 members, the number of African-American legislators grew from three in 1981 to fourteen at the time of redistricting in 1991. J.A. 44. After the 1992 redistricting, eighteen blacks served in the House, seventeen of whom were elected from single-member majority black districts. One was elected from a multi-member majority white district which allows for single-shot voting. J.A. 45. On the Senate side, with fifty members, one African-American was serving at the time of the 1981 redistricting, and five were serving in 1991. J.A. 43. After the 1992 redistricting plans were enacted, seven blacks were elected to the Senate, five of whom won in majority-black single-member districts, and two of whom won in multi-member majority-white districts. Three majority-black single-member districts elected white representatives, two in the Senate and one in the House. J.S. 60a, n. 40; Stip. Ex. 34 at 25. **No single-member majority-white district elected a black candidate to the state legislature.**

At the local level, in 1989, of 529 county commissioners throughout the state, 36 were black. J.A. 299. Most of the African-Americans holding local offices were elected as a result of lawsuits or negotiated settlements changing the method of election from an at-large system to single member districts. Keech & Sistrom, at 171-72 & 178-79.

live in substandard housing than their white counterparts. J.A. 294-98, 645-46, 651-55.[46]

These disparities make it more difficult for black citizens to register, vote, and elect candidates of their choice.[47] At the same time, they create interests common to many African-Americans in the state on social and economic issues which are not shared by many white citizens who lack the experience of longstanding official racial discrimination.[48]

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[46]For example, in 1989, 27.1% of African-Americans in North Carolina had incomes below the poverty level, while 8.6% of whites did. The average per capita income for whites was nearly twice that of blacks. Roughly three-quarters of the state's whites were high school graduates, while slightly over half the state's blacks had a high school education. Nearly a quarter of black households had no car available, while only six percent of white households were carless. Fifteen percent of black households had no phone, while only four percent of white households were without a telephone. J.A. 294-97. Lacking financial resources, transportation and easy communication makes supporting an effective political campaign much more difficult. Willingham Report at 30-35.

[47]For example, black citizens who are illiterate or semi-literate have been intimidated by the voting process because of their limited abilities. Ex. 502, Statements of Sears, Ballance, Williams. Many low-wage and hourly workers have limited access to transportation and cannot afford, or are not given, the time off to vote. Ex. 502, Statements of Michaux, Sears, Ballance, and Williams. Black citizens are hindered in their ability to field candidates and to participate effectively in the political process by their lower financial status, lower educational attainment, lack of employment security and lack of physical resources. Tt. 855 Willingham Report at 30-33; Ex. 502, Statement of Blanks.

[48]Many of these issues, such as housing, access to credit, education of economically disadvantaged youth, unemployment, community economic development, neighborhood redevelopment, the unique concerns of historically black colleges and universities, discrimination in housing and employment, and civil rights, J.A. 643-659; Ex. 502 (Statements of R. Albright, J. C. Harris, E. Davis, E. L. Allison, and O.

(c) The court below found that the General Assembly was specifically aware "that conditions in North Carolina were such that the African-American minority could very likely make out a *prima facie* § 2 challenge to the Chapter 601 plan or, for that matter, to any other Plan that did not contain two majority-minority districts." J.S. 91a. Although appellants contend[49] that compliance with Section 2 was a "post-hoc rationalization" for the plan that was not a concern of the legislature at the time of redistricting, it is difficult to imagine more direct evidence of the legislature's concern about compliance with Section 2 of the Voting Rights Act than the statements of legislators made in floor debates prior to passage of Chapter 7.[50] Again and again legislators debated the proper interpretation of Voting Rights Act, what it requires,

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Blanks), are addressed at the federal level, including by congressional representatives.

[49]Shaw Br. at 27-28; Pope Br. at 29-35. In addition, plaintiffs erroneously assert that the state's compelling interest in complying with §2 of the Voting Rights Act is "newly perceived." Shaw Br. at 27. In fact, that very argument was made by the state in its brief on the merits the first time this case was before this Court. *See*, State Appellees Brief, No. 92-357, at 45-46 (February 24, 1993).

[50]References were made to Section 2 of the Voting Rights Act, Gingles, or vote dilution 51 times in the complete legislative history. *See*, Stip. Ex. 200 at 32, 170, 225, 226, 227, 309, 502, 509, 518, 894 (Section 2); 75, 228, 341, 348, 509, 784, 787, 822, 827, 922, 923, 953, 957, 963, 1239 (*Gingles*); 33, 76, 78, 91, 200, 210, 271, 385, 418, 419, 434, 436, 506, 509, 617, 619, 776, 818, 919, 1041, 1184, 1193, 1207, 1258, 1259, 1286 (dilution of minority voting strength).

and what would be best for all of North Carolina's citizens. *See, e.g.*, J.A. 207, 223, 226.[51]

Members of the 1991 North Carolina General Assembly had lived through, and been active participants in, the history of electoral politics discussed above. Well over half had been in the General Assembly in 1986 when they were required by the *Gingles* litigation to create eight majority-minority districts; and fifty-eight had been members of the 1981 General Assembly which elected to redraw the congressional redistricting plan following the Justice Department's refusal to preclear the first plan. J.S. 90a. They were intimately familiar with the history of discriminatory electoral and other official policies in the state. *See, e.g.* Stip. Ex. 200, at 1268; J.A. 207, 209-10, 212, 237. Speakers at the fifteen local public hearings on redistricting conducted by the

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[51]Both those in favor of Chapter 7 and those opposed to it gave their interpretations of what the Voting Rights Act might require. For example, Senator Winner offered the opinion that "[w]hat the Voting Rights Act says is when you have a big enough concentration of blacks, or any minority, to form a majority that you may not deprive that group of a majority by fracturing them into different districts or by submerging them into multi-member districts." J.A. 200. Senator Hunt, speaking in favor of Chapter 7, referred to the history of segregated schools, the politics of exclusion in the past, and the lack of involvement of blacks on the staff of the Second District Congressman, and argued that "[i]n providing an opportunity for black people to participate in the process, a process which has and will have a major impact upon the lives, upon the life styles, upon the quality of life that black people will enjoy but cannot be anything but right and well doing in such a process." J.A. 214. Senator Ballance specifically mentioned the *Gingles* litigation and his view that the decision does not require guaranteed seats for black Americans but does require an opportunity. J.A. 217. Senator Simpson said he had not read the *Gingles* decision, but he believed that what should be done was to create two compact black districts without regard to incumbency protection. J.A. 220-22.

redistricting committees of the General Assembly in the spring of 1991 also discussed their own experiences of discrimination and the requirements of the Voting Rights Act.[52]

For all of these reasons, on this record there is no basis whatsoever for overturning the finding below that the North Carolina General Assembly had a strong basis in evidence for concluding that the failure to draw two majority-minority congressional districts would violate Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (b). J.S. 91a-93a, 111a.

IV. NORTH CAROLINA HAD A COMPELLING STATE INTEREST IN COMPLYING WITH SECTION 5 OF THE VOTING RIGHTS ACT BECAUSE THE JUSTICE DEPARTMENT CORRECTLY APPLIED SECTION 5

The North Carolina General Assembly did not fall victim to a desire to maximize the number of majority-black congressional districts, or to give black citizens proportional representation. Representative Flaherty introduced a congressional redistricting plan which he argued gave minority voters an opportunity to elect candidates of their choice in three congressional districts. J.A. 249. Stip. Ex. 10, 95-

[52]The legislators were cautioned by several people, including special counsel to the Republican Party, Robert Hunter, who represented plaintiff-intervenors in the *Gingles* litigation, *see, Gingles v. Edmisten*, 590 F. Supp. 345, 349 (E.D.N.C. 1984), that the failure to draw two majority black districts would result in litigation. J.S. 91a-92a. In fact, at one public hearing Mr. Hunter explicitly expressed the opinion that proposed plans fractured the black population and violated Section 2 of the Voting Rights Act. Stip. Ex. 200 at 518.

106.[53] The three districts had a majority of minority registered voters.[54] He argued on behalf of it on the floor of the House on two occasions, saying that it was more compact, that he did not ask the staff to look at partisan issues when drawing this plan, and that it was the only plan he had seen where North Carolina could have three black congressmen. J.A. 269, J.A. 288-90. The Flaherty plan was introduced in the Senate by Senator Leo Daughtry.[55] Stip. 94. Flaherty's plan was rejected along partisan lines in both the House and the Senate. Stip. 92-94.

The court below found that the State of North Carolina had a strong basis in fact for believing that its failure to create two majority-black districts was a violation of the "purpose" prong of Section 5 of the Voting Rights Act. J.S. 111a-112a. Unlike the Justice Department's objection in Georgia, which was based on the failure to create as many majority black districts as possible, the Department's objection in North Carolina was based on the state's decision to favor incumbents rather than create a second majority-black district. *Compare Miller*, 115 S.Ct. at 2492 *with* J.A. 152-53. Had the

[53]Lodged with the court as map 1.Q in Notebook of Relevant Maps Lodged by Parties.

[54]The state population is 22% black. J.A. 64. If black voters had an equal opportunity to elect candidates of their choice in three of the state's twelve congressional districts, they would elect 25% of the congressional delegation. With a majority in two districts they elect 16% of the delegation. Thus, Flaherty's plan would have come closer to adequate representation as described in *DeGrandy*, 114 S.Ct. at 2661.

[55]*See also* J.A. 233 (Senator Lee expressing sentiment during Senate debate that the Justice Department might come back and require three majority-black districts).

Justice Department been following a maximization policy in North Carolina, it would have indicated that the state should adopt some version of Representative Flaherty's three majority-minority district plan. The court below found that the General Assembly had conducted its own independent reassessment of Chapter 601 after considering the concerns identified by the Justice Department, and reasonably concluded that the Justice Department's conclusion was legally and factually supportable.[56] J.S. 112a. Having so concluded, the state did not simply endorse the Justice Department's suggestion about where a second majority black district might be drawn, but rather took into account all of the other state interests important to this General Assembly, and finally enacted a plan which met a variety of goals.

V. CHAPTER 7 IS JUSTIFIED BY A COMPELLING STATE INTEREST IN REMEDYING CURRENT AND PAST DISCRIMINATION

In addition to compliance with the Voting Rights Act, the General Assembly has a compelling interest in remedying racially polarized voting, and the effects of both recent and historical discrimination against black voters. J.S. 55a-57a. *See, Shaw,* 113 S.Ct. at 2831-32 (citing *Croson,* 488 U.S. at 491-493, 518; *Wygant,* 476 U.S. at 280-82, 286). Although the

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[56]There was support for the state's belief that a court might find its first plan to have violated the "purpose" prong of Section 5. Other courts have recognized that intentional discrimination against minority voters may be masked by an asserted interest in protecting incumbents. *Garza v. County of Los Angeles,* 918 F.2d 763, 771, 778-79 (9th Cir. 1990) *cert. denied,* 498 U.S. 1028 (1991); *Ketchum v. Byrne,* 740 F.2d 1398, 1408 (7th Cir. 1984), *cert. denied sub nom. City Council of Chicago v. Ketchum,* 471 U.S. 1135 (1985); *Rybicki v. State Bd. of Elections,* 574 F. Supp. 1082, 1109 (N.C. Ill. 1982) (three-judge court).

court below found that such motivation alone probably would not have led to the passage of Chapter 7, J.S. 108a, this was certainly the goal of some legislators, J.S. 89a.

(a) There was substantial evidence in the record of racial discrimination in congressional redistricting prior to 1990. Most recently, "legislators took special pains in 1965-66 and 1981-82 to dilute black voting strength in order to diminish the political leverage of black voters and the political prospects of potential black candidates."[57] J.A. 621. In both instances, the issue was where to place the large and politically active black population in Durham County so that black voters would not have too much influence in the district. J.A. 621-23; Kousser Report at 34-53.

In 1965 the solution to the "problem" was to place Durham County in the Fifth District rather than create a district in the Triangle (Raleigh-Durham-Chapel Hill) that might have elected a congressman responsive to black political interests. J.A. 622. In 1981, the solution passed by the legislature was "Fountain's Fishhook", a strangely shaped district that curved around Durham to exclude it from L. H. Fountain's Second District. The Justice Department denied that plan preclearance on the grounds that the plan had the purpose and effect of diluting minority voting strength. J.S.

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[57] The history of discrimination against African-Americans in congressional redistricting in North Carolina goes back to 1872, when the state legislature intentionally packed black voters into the "Black Second". Kousser Report at 28. The Black Second effectively confined black voters' control, in a state that was approximately one-third African-American, to a maximum of one district in nine. *Id.* at 29. The shape of the Black Second was described by Republican Governor Todd Caldwell as "extraordinary, inconvenient and most grotesque." E. Anderson, *Race and Politics in North Carolina, 1872-1901: The Black Second* 3 (1981).

90a & n.55; Stip. Ex. 195; Kousser Report at 42. Following the Justice Department's objection, and in the face of a legal challenge on vote dilution grounds, the legislature redrew the plan to include Durham in the Second District, and simultaneously to shift other black populations, notably Northampton County, one of the state's majority-black counties, out of the Second. Kousser Report at 41-44, Ex 501, Report of James O'Reilly, Ph.D. at 5. The Justice Department precleared the second plan because it was approximately 40% black in total population. Kousser Report at 45, Ex. 502, Statement of Mickey Michaux at 4.

As a result of this new Second District, great hope was generated that African-Americans finally had an opportunity to elect a candidate of their choice.[58] Campaigns were mounted by Mickey Michaux and Kenneth Spaulding in the Second Congressional District, in 1982 and 1984 respectively. "Both the Michaux and Spaulding campaigns were serious, strong, well-financed efforts of experienced, well-known candidates with broad support across the District." O'Reilly Report at 5. Despite employing careful and well considered strategies to appeal to voters of both races, neither candidate was able to obtain the Democratic Party nomination because of racially polarized voting and the use of racial appeals in the

[58]There had been two earlier unsuccessful campaigns by African-American candidates for Congress. In 1968, Eva Clayton was the first African-American to run for Congress since 1898. When she began her campaign, blacks constituted only 11% of the registered voters, though they comprised 40% of the Second District's population. Kousser Report at 31. In 1972, after Orange County was added to the Second District, Howard Lee announced his bid for the Democratic Party's nomination. His defeat in the primary was generally believed to be a result of bloc voting along racial lines. Kousser Report at 32-33.

campaigns. J.A. 580-81, 623; O'Reilly Report at 6. Subsequently, potential African-American candidates logically concluded that the expenditure of effort, time and money to run a congressional campaign was not feasible in the light of continued racially polarized voting and the strong perception that they could not win. Ex. 502, Statement of Kenneth Spaulding at 5.

(b) Past redistricting efforts fragmented a compact black population among two or more congressional districts. It is also demonstrably true in North Carolina that the representatives elected in such districts did not serve the interests of their African-American constituents, even when they constituted a sizeable minority. Perhaps the most blatant example of this is the fact that L. H. Fountain, a conservative white Democrat, opposed important civil rights litigation despite having a large black population in his district. J.A. 622.[59]

This anecdotal evidence is supported by the findings of Dr. Kousser's study of congressional roll call behavior which shows that today there is a difference in the effectiveness of

[59]There are other examples in the record. Prior to the enactment of Chapter 7, North Carolina's congressmen demonstrated a lack of responsiveness to the particularized needs of their black constituents. In Guilford County, African-American organizations regularly contacted their white congressman concerning civil rights measures and famine aid to Africa, with little success. Ex. 502, Statement of G. Simpkins. The recent past President of Johnson C. Smith University, an historically black institution in Charlotte, found little support for educational and community development efforts from his white previous congressman, even though the congressman served on the University's Board of Visitors. Ex. 502, Statement of R. Albright. Black residents in many parts of the state found their pre-Chapter 7 congressmen unresponsive to the particularized needs of their black constituents. Ex. 502, Statements of Davis, Ballance, Williams, Allison, Davis.

representation of African-American interests by those elected by African-American voters as compared with those elected from districts in which African American voters are not in the majority.[60] Kousser Report at 20-23.

Given the history of discrimination in North Carolina, the continuing disparities in voter registration rates and opportunities for political participation, the nearly one hundred years of an all-white congressional delegation, and the studies demonstrating that a candidate of choice of black voters has a significantly different voting record than a candidate elected from a district where African-Americans are a substantial minority, the North Carolina General Assembly had a strong basis for concluding that remedial action was necessary. The fact that not enough legislators were motivated by the goal of remedying past discrimination absent the Voting Rights Act does not invalidate the state's compelling interest in this goal.

VI. CHAPTER 7 IS NARROWLY TAILORED

(a) The court below applied standards adopted in the context of other race-based remedial measures to determine how a redistricting plan that justifiably takes race, among other factors, into account should be narrowly tailored to serve the state's compelling interest. J.S. 57a-76a. Under the five basic factors set forth in *United States v. Paradise*, 480 U.S. 149, 171-85 (1987), and developed in earlier opinions of

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[60]The data reported by Dr. Kousser indicate that before 1993, even in the most heavily African-American plurality districts, voting patterns of North Carolina congressmembers on roll call voting indices demonstrate diminished responsiveness to African- American concerns. The numbers show, for example, that throughout the 1970's and 80's, congressmembers elected from heavily African-American districts 1 and 2 consistently scored between 60% and 80% on conservative voting indices. In contrast, Representatives Watt and Clayton score 11% on these indices. J.A. 602-609.

this Court examining affirmative action programs, the plan is narrowly tailored. J.S. 113a.

First, the plan uses racial classifications minimally because it does not create more majority-minority districts than reasonably necessary to give black voters an equal opportunity to elect candidates of their choice to Congress, and the percentages of African-Americans in each district (50.5% in the 1st and 53.5% in the 12th) are no greater than is reasonably necessary.[61] The state's belief that majority-minority districts were necessary was well-founded. After the 1980's redistricting, hopes that the 40% black Second District would allow for the election of the black voters' candidate of choice were deflated by the experience in the Michaux and Spaulding campaigns, which demonstrated that white bloc voting was still sufficient to defeat the black candidate. The General Assembly knew from past experience that a measure using racial classifications to a lesser extent would not be effective in remedying the problem.

Second, the plan employs a flexible goal rather than a rigid quota. There is no guarantee that the black voters' candidate of choice will be elected in a majority-black district. For example, three white members of the North Carolina General Assembly were elected from majority-minority districts created by the *Gingles* litigation. J.S. 60a.

Third, the redistricting plan is a temporary remedy which can be redrawn after the next census. Section 5 of the

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[61]*Cf. United Jewish Organizations v. Carey*, 430 U.S. 144, 164 (1977) (it was reasonable for the Attorney General to conclude that 65% minority necessary); *Ketchum v. Byrne*, 740 F.2d at 1413-1417 (extensive discussion of precedents establishing that 65% super-majority needed to give black voters equal opportunity to elect candidates of their choice).

Voting Rights Act will not necessarily lock in the two majority-black districts by virtue of the non-retrogression principle because Section 5 itself will be reviewed by Congress in 1997 and will expire in the year 2007. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, §2a, 96 Stat. 131, 133 (1982) (codified at 42 U.S.C. §1973b(a)) (Supp. 1993).

Fourth, there is a reasonable relationship between the number of majority-minority voting districts and the number of minorities in the state. J.S. 62a-63a. Thus the goal is reasonably related to the pool of individuals whose votes were previously diluted and hence, who benefit from having an equal opportunity to elect candidates of their choice. Finally, the plan does not unduly burden the rights of third parties because it complies with all applicable constitutional requirements. J.S. 64a.

(b) A redistricting plan does not need to be compact in order to be narrowly tailored.

(1). A state may pursue rational redistricting goals, such as recognizing historical, cultural and economic communities of interest, and preserving the core constituencies of incumbents, at the expense of geographical compactness, which is neither a federal, state or constitutional requirement for congressional districts. *See* J.S. 68a-74a; *Shaw v. Reno*, 113 S.Ct. at 2827. To be sure, a federal court must take action if a redistricting plan fails to give equal weight to the vote of all individuals, *Reynolds v. Sims*, 377 U.S. at 566-67, or dilutes the voting strength of an identifiable group of voters, *Davis v. Bandemer*, 478 U.S. at 109, 124, *Thornburg v. Gingles*, 478 U.S. at 80, or is not grounded in rational districting principles. *Reynolds*, 377 U.S. at 568. However, where a redistricting plan stays within these constitutional and statutory boundaries, the federal courts should not be reordering the state's legitimate

and rational redistricting priorities. The court below correctly interpreted *Shaw v. Reno* to hold that where a state has a substantial basis for concluding that it must create majority-minority districts to comply with the Voting Rights Act, or to remedy past discrimination, lack of compactness does not invalidate the redistricting plan. J.S. 66a.

The plaintiff-intervenors argue that Districts 1 and 12, as enacted are invalid because they fail the *Gingles* compactness standard and are located in a part of the state different from where the "compact" black population resides.[62] Pope Br. at 36-38. This argument is directly contrary to long-standing precedent and established practice in voting rights jurisprudence.

Having decided that anything less that two majority-black districts would likely violate Section 2 of the Voting Rights Act, the General Assembly had the discretion to determine how best to locate those districts and what other non-racial redistricting principles would be followed in their formulation. *See Wise v. Lipscomb*, 437 U.S. 535, 539-40 (1978); *Connor v. Finch*, 431 U.S. 407, 414-15 (1977) (reapportionment

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[62]This argument is premised on a fact exactly contrary to what the court below actually held. The district court found that Districts 1 and 12 are generally located in areas of the state where violations of the Voting Rights Act have occurred. J.S. 107a. Of the 552,386 citizens who reside in the First District, 472,168, or 85.5%, reside within counties covered by Section 5 of the Voting Rights Act. J.A. 63, Stip. 112. Section 2 violations were found in 11 of the counties in the First District in *Gingles*, and since then, Section 2 actions have resulted in changes of election method in 21 counties and cities in the district. J.S. 197a. Of the 552,386 citizens who reside in the Twelfth District, 407,547, or 73.8%, live in counties covered by Section 5, or where Section 2 violations were found in the *Gingles* litigation or subsequently. Keech Dep., Tables 8A and 8B and Ex. 578.

is the prerogative of the legislature, which is uniquely positioned to balance varied state policies). As Amici Curiae North Carolina Legislative Black Caucus and North Carolina Association of Black Lawyers explain in greater detail, courts in Section 2 litigation routinely approve less geographically compact districts than are possible because the less compact districts better accommodate a jurisdiction's various competing concerns. In addition, only requiring that majority-black districts be compact has serious constitutional implications. *See* Brief of Amici Curiae North Carolina Legislative Black Caucus et al., at 6-21, 26-30.

Any jurisdiction responding to a Section 2 violation in the course of litigation has the right to propose a remedy that may or may not follow the outlines of the plan introduced by the plaintiffs at the liability stage, and the court is required to give due deference to the jurisdiction's redistricting choices, so long as the plan remedies the violation. *Upham v. Seamon*, 456 U.S. 37, 41-43 (1982); *Wise v. Lipscomb*, 437 U.S. at 540; *White v. Weiser*, 412 U.S. 783, 794-97 (1973).[63] A state voluntarily complying with the Voting Rights Act has the same, if not more, discretion than a jurisdiction judicially compelled to comply would have. *See Voinovich*, 113 S.Ct. at 1156.

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[63]Indeed, the only basis for rejecting a plan proposed by the jurisdiction would be that the plan fragments black voters or proposes majority black districts which do not have a sufficiently high percentage of black voting age population to give black voters a realistic chance to elect candidates of their choice. *Voinovich v. Quilter*, 113 S.Ct. 1149, 1157 (1993) ("federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements.") *See, also, Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990) *cert. denied*, 498 U.S. 1028 (1991); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied sub nom. City Council of Chicago v. Ketchum*, 471 U.S. 1135 (1985); *U.S. v. Dallas County Commission*, 850 F.2d 1433 (11th Cir. 1988).

Moreover, plaintiff-intervenors' assertion that "members of the group injured by vote dilution could still prove their claim -- regardless of the State's decision to form a district somewhere else" (Pope Br. at 37) is wrong. If the State of North Carolina enacts a plan with two of twelve congressional districts giving black voters an opportunity to elect candidates of their choice, then black voters in the rest of the state, even if they could be combined into a different majority-black district, are not likely to succeed with a Section 2 claim because they would be unable to show that the plan diluted their voting strength.[64]

Under Section 2, the State of North Carolina cannot be required to locate the majority-minority districts in any particular region of the state,[65] and cannot be required to make the districts any particular shape or fit any specific mathematical measure of compactness. It would make no sense to impose restrictions on a state that is voluntarily complying with the Voting Rights Act, in the guise of requiring a voluntary plan to be narrowly tailored, that a court could not require if a Section 2 violation is found and the state is compelled to create majority-black districts.

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[64] *See Johnson v. DeGrandy*, 114 S.Ct. at 2651 (no violation of §2 where minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population).

[65] Plaintiff-intervenors argue that the Solicitor General recognized that a Section 2 remedy must be "connected to the geographically compact group of minorities allegedly injured by vote dilution" during oral argument in *Hays v. Louisiana*, 115 S.Ct. 2431 (1995). In fact, the passage cited refers to a different question altogether, namely whether a plan with non-compact districts can be justified by a compelling state interest in complying with Section 2.

(2). Requiring compactness as an essential element of a narrowly tailored plan would require the state to abandon other legitimate redistricting goals. Evidence in this case showed that urban residents of the compact 3rd District in the Shaw II plan had little in common with the residents of the rural counties joined with it. Thus, requiring a compact majority-black district would indeed require the state to take race and little else into account. It would force the state to combine voters who had less in common into districts with each other, regardless of race. The balancing and prioritizing of redistricting goals is best determined by the elected members of the state legislature rather than federal courts.

North Carolina's majority-black districts do not take race into account more than is necessary to remedy this state's long history of racial discrimination in politics and elections. They are an interim measure which will erode the influence of racial discrimination in elections. J.A. 224-225.

CONCLUSION

The complaint should be dismissed for lack of standing. Alternatively, the decision of the court below should be affirmed because race was not the predominant factor in the creation of North Carolina's congressional districts. Additionally the state had a compelling interest in complying with the Voting Rights Act and remedying past discrimination, which it satisfied with a narrowly tailored redistricting plan.

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Nos. 94-923 and 94-924

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

RUTH O. SHAW, *et al.*,
Plaintiff-Appellants,
v.
JAMES B. HUNT, JR., in his official capacity
as Governor of the State of North Carolina, *et al.*,
Defendant-Appellees.

JAMES ARTHUR POPE, *et al.*,
Plaintiff-Intervenors Appellants,
v.
JAMES B. HUNT, JR., in ~~his~~ official capacity
as Governor of the State of North Carolina, *et al.*,
Defendant-Appellees.

On Appeal From The United States District Court
For The Eastern District of North Carolina

REPLY BRIEF OF APPELLANTS SHAW, *ET AL.*,

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REPLY BRIEF OF APPELLANTS SHAW *ET AL*

Once again this Court has before it the "bizarre" North Carolina redistricting plan that gave rise to the decision in *Shaw v Reno*, 113 S.Ct. 2816 (1993), and its recognition of a claim "'analytically distinct' from a vote dilution claim." See *Miller v Johnson*, 115 S.Ct. 2475, 2485 (1995). Innumerable efforts have been made to obscure *Shaw's* message that racial distinctions, whether overt or concealed, are "by their very nature odious to a free people," *Hirabayashi v United States*, 320 U.S. 81, 100 (1943), and therefore are subject to "strict scrutiny." *Richmond v J. A. Croson*, 488 U.S. 469 (1989). These efforts -- which have included ridicule,[1] conjuring up retrospectively a nonexistent legislative intent,[2] using

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[1] Some critics have portrayed *Shaw* as being concerned with "aesthetics." See, e.g., State Br. 47, which quotes the reference in *Shaw v Hunt*, 861 F.Supp. 408, 454 (E.D.N.C. 1994) to "districts whose lines are sufficiently 'regular' or 'pleasing' in their appearance to satisfy the aesthetic sensibilities of a handful of unelected federal judges." This criticism misses the point that in congressional redistricting, "appearances do matter," *Shaw* at 2827, because shape "may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Miller*, 115 S.Ct. at 2486. Moreover, as pointed out before (Shaw Br. 20-22), the "appearances" also emphasize the racially polarizing message of the gerrymander and reveal the lack of "narrow tailoring."

[2] In line with the conclusion reached by the majority in the court below, Appellees attribute the redistricting plan enacted by Chapter 7 on January 24, 1992 to the General Assembly's "reevaluation" of the legality of the original plan enacted a half year earlier. See State Br. 11-13. Yet the legislative history of Chapter 7

purported "experts" to rationalize that bogus intent post hoc,[3] distorting the meaning of words,[4] omitting significant

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makes clear that any "reevaluation" related not to the legality of the original plan but instead to the inability to obtain preclearance and to the possibility for Democrats to create two majority-black districts, and elect two black Representatives as mandated by the Civil Rights Division, without injuring Democratic incumbents.

[3] Appellees, like the majority in the court below, rationalize the distorted boundaries of each of the two majority-black districts as a recognition by the General Assembly of the community of interest among the persons placed in each district. However, until January 1993, the General Assembly did not have available the socioeconomic information now being used to justify the district boundaries, which a computer operator formed by manipulating the 229,000 census blocks into which North Carolina is divided. In *Hays v Louisiana*, 839 F.Supp. 1996 (W.D. La. 1993), vacated, 114 S.Ct. 2731 (1994), the three-judge district court strongly criticized both the methodology and the "expert" later relied on by the State Appellees in *Shaw v Hunt*.

[4] For example, Appellees and their Amici have insisted that, instead of being a version of "apartheid," the two majority-black districts in North Carolina are among the most "racially integrated" in the country. See, e.g., ACLU Br. 17. Their premise is that when the number of blacks who reside in a district is the same as the number of whites, "integration" has been attained. Obviously this premise is wrong because it ignores where persons of the different races are located within the district. If all blacks live in one half of a district and all whites live in the other half, that district is not "integrated." Similarly, the two North Carolina majority-black districts, which were formed by connecting concentrations of blacks with "white corridors," are "segregated" -- not "integrated." The Amicus Brief for the United States also obscures the issues before this Court by using throughout the term "black opportunity district" instead of the previously-used and more accurate terms "majority-black district" and "majority-minority district." See also 861 F.Supp. at 417, n. 3.

language from quotations,[5] and employing personal invective[6] -- now culminate in the briefs of the Appellees and their Amici in this Court. Despite this onslaught by those who disparage the ideal of a "color-blind society" as being unrealistic and attack those who object to the use of race to allocate political office, this Court must not retreat

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[5] A comparison of language in the State Appellees' Brief at 31 concerning testimony by Congressman Watt with the transcript of that testimony (JA 511-12) reveals such an omission, which has the effect of changing the meaning. The transcript makes clear that, as stated in Shaw Appellants' Brief at 44, n. 42 and in Chief Judge Voorhees' dissent (861 F.Supp. 478, n. 5), Congressman Watt stated in a videotaped panel that he preferred not "having to cater to the business *or white* community" (emphasis added). Similarly, the briefs of the State Appellees at 32 and the Gingles Appellees at 15, contain parallel quotations concerning "traditional race-neutral districting principles;" but each brief omits from the quotation the words "including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests." See 115 S.Ct. at 2488. By this omission Appellees obviously were seeking to minimize the importance of "traditional principles" like "geographic compactness" -- a principle specifically relied on in *Gingles* and in *Shaw* -- and were attempting subtly to substitute amorphous concepts like "functional compactness" and "homogeneity." Similarly, in both briefs, the immediately preceding sentence omits from quoted language of this Court its reference to a "district's shape and demographics" as "circumstantial evidence" of legislative purpose. This omission is a parallel effort by Appellees to obscure *Shaw's* teaching that their "bizarre" shapes demonstrate that race was the predominant factor in the creation of Districts One and Twelve.

[6] Appellants submit that the Gingles Appellees' Brief at 12-13, contains a clear accusation that Appellants Shaw and Shimm -- who reside in the Twelfth District -- are white racists. This ad hominem attack on Appellants is a time-honored but deplorable tactic, which only obscures constitutional issues.

from the principled position it took in *Shaw*. Instead it should reemphasize the basic principles of race neutrality implicit in the Fourteenth and Fifteenth Amendments.

I. Appellants Have Standing

In the wake of *United States v Hays*, 115 S.Ct. 2431 (1995), Appellees contest Appellants' standing to assert their constitutional claims. See State Br. 30; Gingles Br. 8. In so doing, Appellees reveal their misunderstanding of *Shaw*, for the gist of a *Shaw* claim is that a registered voter has a right to be free from race-based redistricting. As both *Hays*[7] and *Miller*[8] make clear, *any* registered voter who resides in a racially gerrymandered district has standing to complain of the constitutional injury which results from being placed in a district whose boundaries have been drawn on the basis of race. The "expressive harm" caused by racial gerrymandering is similar to that which results from other race-based classifications.[9]

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[7] "Where a plaintiff resides in a racially gerrymandered district, . . . the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's actions[.]" 115 S.Ct. at 2436.

[8] "As residents of the challenged Eleventh District, all Appellees had standing." 115 S.Ct. at 2485, citing *Hays*.

[9] Thus, under the Equal Protection Clause, "the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks..., buses..., golf courses..., beaches... and schools." See *Miller*, 115 S.Ct. at 2486 and cases cited there. It makes no difference that the segregated parks, buses, golf courses, beaches, and schools are "equal" so long as they are "separate." Identification of candidates by race also violates equal protection because it induces race-based voting. *Anderson v Martin*, 375 U.S. 399 (1964).

Appellants Shaw and Shimm are "white filler people"[10] in a corridor which connects concentrations of blacks so that the boundaries of the Twelfth District will include more than a majority of registered black voters. However, as this Court made clear in *Shaw*, Appellants' race is irrelevant to their standing to challenge racial gerrymandering.[11] Furthermore, the automatic standing of Appellants Shaw and Shimm under *Hays* and *Miller* makes equally irrelevant whether their Congressman -- Melvin Watt -- is representing them effectively.[12] They are not required to establish that their representative in the Congress has "voted wrong" or neglected his duties; it is the unconstitutional race-based process by which the representative was selected that gives rise to their

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[10] This term refers to white voters in majority-black districts, who "should not be expected to compete in any genuine sense for electoral representation" in those districts, "lest they undo the preference given to the specified minority group." See T. Alexander Aleinikoff and Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines after* Shaw v Reno, 92 Mich.L.Rev. 588, 630-31 (1993).

[11] Cf. *Powers v Ohio*, 499 U.S. 400 (1991) (defendant may object to race-based exclusion of jurors through peremptory challenges whether or not defendant and excluded jurors share same race); *J.E.B. v Alabama ex rel. T.B.*, 114 S.Ct. 1419, 1421 (1994) (litigants and potential jurors have right to jury selection procedures "free from state-sponsored group stereotypes rooted in and reflective of historical prejudices").

[12] It seems clear, however, that a racial gerrymander sends a message to elected officials, "that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." See *Miller* 115 S.Ct. 2436, quoting *Shaw*. The testimony of Congressman Watt, previously cited in this brief at n. 5, makes clear that he was quite predisposed to this message.

standing.[13] Likewise, a registered voter's standing does not require evidence that the voter actively opposed the Representative who was elected by an unconstitutional process.[14] Of course, the assertion in Gingles Appellees' Brief at 12-13 that Appellants Shaw and Shimm simply object to being represented in Congress by an African American confuses with bias Appellants' concern for constitutional principles.[15]

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[13] In addition to their "stigmatic injury," Appellants Shaw and Shimm were harmed by being placed in a "dysfunctional" district which is the least geographically compact in the United States. See Shaw Br. 35-39. This harm also confers standing because no nexus is required "between the injury [Appellants] claim and the constitutional rights being asserted." *Duke Power Co. v Caroline Environmental Study Group*, 438 U.S. 59, 73 (1978); *Northeastern Florida Contractors v Jacksonville*, 113 S.Ct. 2297 (1993).

[14] Gingles Appellees' Brief at 11 notes that "Plaintiffs" had "actually voted for" Congressman Watt. It is unclear who is embraced within the term "Plaintiffs." Admittedly -- in response to a question that he termed "unprincipled," cf. *Rodgers v Lodge*, 458 U.S. 613, 647 n. 30 (1982) (Stevens, J., dissenting) -- Appellant Shimm acknowledged that in the general election he had voted for Watt. However, a voter whose choices are limited by racial gerrymandering does not waive his right to equal protection by making one of the limited choices available, rather than failing completely to exercise the most precious right of citizenship.

[15] The depositions Appellees took of Shaw and Shimm make clear that they have never hesitated to vote for African Americans or to cooperate interracially in political activities. See Shaw Br. 45, n. 44. Therefore, it is especially ironic that they are represented in Congress by an African American who has expressed publicly his satisfaction that he need not "cater to" the "white community" and who has stated on national television and elsewhere that he believes the majority opinion in *Shaw* was based on "racist assumptions." JA 509.

Appellees also insist that Appellants Shaw and Shimm only have standing to attack the Twelfth District, in which they were placed by the racial gerrymander. However, as the record clearly reveals, the racial gerrymandering required to create the majority-black Twelfth District had an inevitable "ripple effect" on the boundaries of the First District and other districts;[16] and therefore the Appellants Shaw and Shimm had standing to challenge not only the Twelfth District, where they were registered to vote, but also all the districts subject to the "ripple effect."[17] Due to the "ripple effect" of creating the majority-black Twelfth District, the other three Durham Plaintiffs -- the Everetts and Bullock -- also had standing to challenge not only that district but also the other districts. Ironically, Appellees' implausible explanation for the boundaries of the two majority-black districts confirms the standing of these Plaintiffs.[18]

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[16] The extent of the "ripple effect" -- a term employed by State Appellees' Brief at 5 -- is demonstrated by the circumstance that in the North Carolina General Statutes, §163-201, the first redistricting plan covered six pages (173-179); but the later plan covers 37 pages (141-178 in Supplement to §163-201).

[17] The creation of the two majority-black districts also had a "profound reciprocal effect on the racial composition of" the ten other districts and made them more predominantly white. Cf. *Keyes v School District*, 413 U.S. 189, 201-02 (1973). This "reciprocal effect" requires examination of the entire redistricting plan in order to determine whether racial gerrymandering has occurred and, if so, to perform the necessary "strict scrutiny." Therefore, no basis exists to preclude Appellants from attacking all the districts affected by the creation of the First and Twelfth Districts.

[18] The Chapter 601 plan placed all of Durham County in the First and Second Districts, both of which districts were predominantly "rural" -- at least as Appellees now use this term. However, the

As reflected in the "bizarre" appearance of the North Carolina plan, the creation of the two majority-black districts had a "profound reciprocal effect" on the boundaries and racial composition of the other ten districts. Under these circumstances, Appellants submit that the court below did not violate *Hays* in holding that all registered voters, white or black, who reside in North Carolina have standing to challenge the racial gerrymander.[19] In any event, since Appellants Shaw and Shimm have standing, this Court "need not consider whether the other individual . . . plaintiffs [or the plaintiff-intervenors] have standing to maintain the suit."[20]

Chapter 7 plan linked Durham blacks with concentrations of blacks in Charlotte and Gastonia some 150 miles away, because of an alleged State interest in having a majority-black "urban" district. In explaining this "interest," State Appellees' Brief at 23 refers to the testimony of Representative Toby Fitch, a co-chair of the House Redistricting Committee, that "There's a difference between a black in Durham and a black in Warren County or a black in Wilson County." See JA 411-12. In testimony suffused with racial stereotypes, Fitch, an African-American attorney, explained: "In other words, those who wore suits and didn't work in the field, as such, could be with those who wore suits and those who wore bib overalls could kind of be together with us who wore bib overalls." If this post hoc rationalization were accepted, the corollary would be that, unlike its concern with creating an "urban" district for blacks, the General Assembly had no concern about placing "urban" whites in Durham County -- like Appellants Everett and Bullock -- with the "rural" whites in "coveralls" in the rest of the Second District.

[19] See 861 F.Supp. at 425.

[20] *Arlington Heights v Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264, n. 9 (1977). From the filing of their complaint, Appellants have attacked the entire redistricting plan; but any significant reconfiguration of either majority-black district would inevitably require redrawing the boundaries of most, if not all, other districts in the State. .

II. The Lower Court's Finding of a Racial Gerrymander Was Correct by any Standard

Plaintiffs proved -- and the district court found unanimously[21] -- that the redistricting plan was a racial gerrymander. Indeed, the plan "is so bizarre on its face that it is 'unexplainable on grounds other than race,'" *Shaw*, 113 S.Ct. at 2825 (citing *Arlington Heights*);[22] and racial data were the only socioeconomic information in the computer used to draw the plan. Moreover, the race-based purpose is highlighted by the sequence of events[23] -- the December 17, 1991 meeting with Assistant Attorney General John Dunne in Washington,[24] the preclearance letter the next day,[25] the subsequent legislative history,[26]

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[21] See Finding 1 and Conclusion 4 at 861 F.Supp. 473. Indeed the court concluded that the State Defendants essentially had conceded the issue. *Ibid.*

[22] Consistent with *Miller's* discussion of the relevance of "shape" as "persuasive circumstantial evidence," 115 S.Ct. at 2486, a comparison of maps of district boundaries for the First and Twelfth District with maps showing "racial and population densities" makes clear "the story of racial gerrymandering." *Id.* at 2489; see maps 8, 10-15 in Exhibit 301.

[23] "The specific sequence of events leading up to the challenged decision also may shed light on the decisionmaker's purpose." *Arlington Heights*, 429 U.S. at 267 (1977).

[24] See Senator Winner's testimony, JA 696-98, 701.

[25] Gerry F. Cohen, the person who actually drew the North Carolina plan, testified specifically that after receipt of the letter denying preclearance, his interpretation was "that the Justice Department would not grant preclearance unless two majority

and the letter by which the General Assembly solicited preclearance of the Chapter 7 plan.[27] The State's defense that it had a "compelling interest" in compliance with § 5 equates to an assertion of its race-based purpose of creating two majority-black districts. Carrying out this legislative purpose had an obvious and inevitable "reciprocal effect on the racial composition of" the other districts. In short, as demonstrated by the legislative record and by overwhelming circumstantial evidence, the dominant intent of the General Assembly in enacting Chapter 7 was to establish "quotas" of two black and ten white representatives from North Carolina.[28]

Appellees maintain, however, that the lower court failed to find a "predominant" race-based motive, and that

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minority districts were created." JA 675. See also Cohen's testimony that "the principal reason for" the configuration of the First District "was to create one of two majority minority districts in North Carolina." *Ibid.*

[28] In remarks on the Senate floor, Dennis Winner, Senate Redistricting Committee Chair, made clear Chapter 7's predominant race-based purpose shortly before its enactment. JA 196-205.

[27] North Carolina's letter to the Department of Justice asserts that the "**overriding purpose** was to comply with the dictates of the Attorney General's December 18, 1991 letter and to **create two congressional districts with effective black voting majorities.**" JA 162 (emphasis added).

[28] To the extent the plan protected incumbents, as Appellees now contend, the protection was of "white incumbents" and was consistent with the "quotas." Of course, the protection of "white incumbents" was a reason stated by Assistant Attorney General John Dunne for denying preclearance of the first plan. JA 153.

this was required by *Miller*.[29] However, the lower court's findings, when considered in the aggregate, make clear that, as in *Miller*, the state's "dominant concern" was "[b]eyond any question" to create a prescribed number of majority-black districts.[30] Moreover, even if, in redistricting, the General Assembly used race occasionally as a proxy for political affiliation, this would not prevent race from being the "predominant motive" for North Carolina's gerrymander. Indeed, as *Powers* held in a parallel context, such use of race as a "proxy" is impermissible because it "accept[s] as a defense to racial discrimination the very stereotype the law condemns." 499 U.S. at 410.

III. The State Lacked Any Compelling Interest In Creating The Racial Gerrymander

When this case was originally before the court in April 1993, no defense was offered that the State had enacted the redistricting plan in order to remedy past racial discrimination. The only justification was a purported intent of the General Assembly to comply with

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[29] As Appellants have pointed out in their Brief on the Merits at 19, n. 16, the usual requirement for invoking "strict scrutiny" of a racial classification is the presence of a race-based motive without which the plan would not have been adopted. Thus, in *Hunter v Underwood*, 471 U.S. 222 (1985), this Court gave no indication that the race-based purpose must be "predominant" in order to permit an equal protection attack on voting requirements. To impose any additional requirement would lead to confusion, attempts at evasion, and the "inconsistency" deplored in *Adarand Constructors, Inc. v Pena*, 115 S.Ct. 2097, 2111 (1995).

[30] For example, the district court found that "the plan's lines were deliberately drawn so as to create one or more districts in which a particular racial group is a majority." See 861 F.Supp. at 431.

the Voting Rights Act. Indeed, as noted in the Shaw Appellants' Brief on the Merits at 4 and 27, the oral argument for the State Appellees focused almost exclusively on compliance with § 5 of the Voting Rights Act. On remand, new defenses were asserted.

One such defense was that the State had adopted the second redistricting plan to remedy the effects of racial discrimination. However, the district court found that any "sentiment" in the General Assembly for eradicating effects of past or present discrimination in North Carolina's political processes "was not sufficient in voting power to have caused the legislative action independent of the perceived compulsion of the Voting Rights Act." See 861 F.Supp. at 473, Finding 3. This finding makes irrelevant the generalized racial discrimination on which Appellees rely in seeking to establish a "compelling interest."[31]

Miller has demolished the State's primary defense -- compliance with § 5 of the Voting Rights Act. State Appellees' Brief at 40 feebly attempts to distinguish *Miller* on the ground that -- unlike Georgia -- the "maximization policy" of the Civil Rights Division "was not at work in North Carolina." However, in light of the facts of this case and the judicial findings in the Georgia and

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[31] This Court has demonstrated justifiable unwillingness to sustain racial classifications because of "societal" discrimination. "Societal discrimination, without more, is too amorphous a basis for imposing a racially-classified remedy." *Wygant v Jackson Board of Education*, 476 U.S. 267, 276 (1986). Cf. *Richmond v J. A. Croson, supra; Adarand, supra; Freeman v Pitts*, 503 U.S. 467 (1992); *Missouri v Jenkins*, 115 S.Ct. 2038 (1995).

Louisiana redistricting cases,[32] the Court would be blind to reality if it failed to recognize that, as in Georgia, the denial of preclearance in North Carolina resulted from the same policy of the Department of Justice.[33] In any event, the General Assembly believed, with good reason, that the Department of Justice would continue to deny preclearance until two majority-black districts were created. Under *Miller*, a belief -- mistaken or otherwise -- that obtaining preclearance requires a racial gerrymander cannot give rise to a "compelling interest."

Appellees also claim that the second redistricting plan was justified by a "compelling interest" in complying with § 2 of the Voting Rights Act and that the General Assembly came to perceive this interest because denial of preclearance led to a "reevaluation" of the State's liability to a successful § 2 action. This contention is contrary to the legislative record, which makes clear that for most legislators the sole concern was with obtaining preclearance.[34] Also, it implies that the General Assembly acted in bad faith when it sought to justify the original redistricting plan, which had a single majority-black district. Cf. *Miller*, 115 S.Ct. at 2489-90. Furthermore, if a "reevaluation" occurred -- as the State Appellees now claim -- the stimulus was the administrative denial of preclearance without a hearing and incident to the

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[32] *Hays v Louisiana*, 839 F.Supp. 1996, n. 21 (W.D.La. 1993), vacated, 114 S.Ct. 2731 (1994); *Miller*, 115 at 2491.

[33] In the letter denying preclearance of the first redistricting plan, the discussion of the feasibility of a "second majority-minority congressional district" reflects the "max-black" policy. *JA* 152-3.

[34] See, e.g., testimony of Senator Dennis Winner, Chair of the Senate Redistricting Committee, *JA* 702-03.

apparent effort by the Civil Rights Division to enforce its illegal "max-black" policy. Under these circumstances, any "reevaluation" by the General Assembly was tainted by the illegal "maximization policy" -- which *Miller* condemned -- and should be disregarded.[35]

If the General Assembly had concluded that the State was susceptible to a successful § 2 suit, this conclusion would have had no "strong basis of evidence." No suit could succeed without fulfilling the conditions set forth in *Thornburg v Gingles*, 478 U.S. 30, 50-51 (1986).[36] Thus, for the General Assembly to conclude that a racial gerrymander would be necessary to prevent liability under § 2, the legislators would have had to believe that imaginary plaintiffs challenging the first plan could establish by a preponderance of the evidence that the *Gingles* conditions were satisfied in North Carolina --

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[35] The argument has also been made that denial of preclearance of the first plan was equivalent to a finding that the State had purposefully violated § 2. In view of the lawless enforcement of § 5 by the Civil Rights Division, to accept this argument would lead to a result in conflict with *Miller's* holding that a State has no "compelling interest in complying with whatever preclearance mandates the Justice Department issues." 115 S.Ct. at 2491. In considering the effect of the denial of preclearance, the majority in the district court only required that the General Assembly "reasonably conclude" that the Justice Department's interpretation and enforcement of the Voting Rights Act be "legally and factually supportable." This falls short of *Miller's* requirement that a state must show that its race-based decisionmaking was "reasonably necessary under a constitutional reading and application of" federal voting rights legislation. *Ibid.*

[36] *Growe v Emison*, 113 S.Ct. 1075 (1993). Satisfying these conditions is necessary, but not always sufficient, for establishing a § 2 violation. *Johnson v DeGrandy*, 114 S.Ct. 2647 (1994).

namely, that (1) the black population is "sufficiently large and geographically compact to constitute a majority" in two single-member districts, (2) they are politically cohesive, and (3) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate in districts that are not majority minority." *Ibid.* Because African Americans constitute only 20% of North Carolina's voting age population, are widely dispersed, and are not a majority in any large-sized county, simple mathematics suggests that the *Gingles* requirement of geographical compactness cannot be met for two districts.[37] However, the majority in the court below stated: "The overwhelming evidence established that the State's African-American population was sufficiently large and geographically compact to constitute a majority in two congressional districts; numerous examples of plans drawing two majority-minority districts were presented to the court . . . including several prepared by the Plaintiff-Intervenors in which the majority-minority districts themselves were 'geographically compact' under any reading of *Gingles*." 861 F.Supp. at 463-65. In support of this proposition, a total of eleven plans are cited. 861 F.Supp. at 462-65. As this Court can readily determine from visual examination of these plans, which are in the record and have been lodged with the Court, *none* of these plans conforms to the assertion by the majority in the district court.[38] Thus, contrary to the "clearly

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[37] To fulfill the requirement would necessitate creating two compact districts with at least 276,194 African Americans in each.

[38] Eight of these plans have majority-black districts which are merely variations of the current Twelfth District -- the "least geographically compact" congressional district in the country. Another has a non-compact majority-black district which runs along the Virginia border. The final two plans cited by the majority below

erroneous" finding of the court below, it is clear that no plan exists or can be produced which would satisfy the first *Gingles* condition of a black population sufficiently "geographically compact" to constitute a majority in two congressional districts.[39] Since Appellees had the "burden of producing" a map which would show that it is possible to draw two geographically compact majority-black districts,[40] Appellees can gain no support from § 2 until

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were created by Dr. Hofeller, the expert for Plaintiff-Intervenors; and in each, there is only one majority-black district and another district in which blacks are less than 42% of the voting age population. Thus, as revealed by the tables that accompany each plan, these two plans would create *only one* majority-black district. The majority below specifies that "majority-minority district" means majority-black. 861 F.Supp. 417, n. 3; and so, it could not have considered a plurality-black district to be a "majority-minority district." On the important constitutional issues of this case, the Court should disregard lower court findings so "clearly erroneous" that it is incomprehensible why they were made.

[39] Redistricting plans probably can be drawn that contain two majority-black districts more geographically compact than the "bizarre" First and the Twelfth Districts. This does not satisfy the first *Gingles* condition; but it shows the absence of "narrow tailoring."

[40] Even Appellees do not dispute that they bear the "burden of production" as to "compelling interest" and "narrow tailoring." State Br. 38. Citing statements in *Wygant*, they contend, however, that the burden of persuasion on these issues remains on Plaintiffs. Appellants submit that *Wygant* did not address the distinction between "burden of production" and "burden of persuasion." Because racial gerrymanders are "constitutional crimes," this analogy seems appropriate: In a criminal case, the prosecution always has the burden of proving guilt beyond reasonable doubt, *In re Winship*, 397 U.S. 358 (1970); but nevertheless, as to various defenses, the burden of persuasion often rests on the defendant. *Martin v. Ohio*, 480 U.S. 228 (1987); *Patterson v. New York*, 432 U.S. 197 (1977). See also James F. Blumstein, *Racial Gerrymandering and Vote Dilution: Shaw*

that burden has been carried.[41]

Unlike § 5, which applies only to a defined class of "covered" jurisdictions and incorporates a specific principle of nonretrogression, § 2 applies nationwide and requires a fact-intensive consideration of a "totality of circumstances." *Johnson v. DeGrandy*, *supra*. Moreover, § 2 no longer applies only to "intentional discrimination." *Chisom v. Roemer*, 501 U.S. 380, 395 (1991). Thus, under *Croson* and *Adarand*, § 2 – or the possibility of a successful § 2 suit – cannot give rise to a "compelling interest" in the enactment of race-based classifications. See Blumstein, *supra*, n. 40, at 586-87. The Court has recently made clear that the focus of § 2 is on "political opportunity." *De Grandy*, 114 S.Ct. at 2658. Section 2 is "not a guarantee of electoral success for minority-preferred candidates;" instead, "the ultimate right of § 2 is equality of opportunity." *Id.* at 2650, n. 11; see also *Whitcomb v. Chavis*, 403 U.S. 124 (1973).[42] *Chisom v. Roemer*, 501 U.S. 380, 396-97, has made clear that § 2 provides a unitary right and that it does not create a right to a particular outcome. Blumstein, *supra*, n. 40, at 574-75. Therefore, to accept compliance with § 2 as a

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v. Reno as Doctrinal Contest, 26 RUTGERS L.J. 517, 589-92 (1995).

[41] Because they cannot satisfy the requirement of "geographic compactness," Appellees – and the majority below – create a new and amorphous concept of "functional compactness." This concept lacks the support of precedent, depends on racial stereotyping, and is an obvious evasion of the first *Gingles* condition.

[42] The holding in *DeGrandy* that "[f]ailure to maximize [majority-minority districts] cannot be the measure of § 2," *id.* at 2660, is consistent with the "equality of opportunity" focus of § 2.

"compelling interest" that justifies enactment of race-based legislation intended to guarantee the election of minority candidates would totally distort the purpose of § 2 and extend its scope far beyond what Congress authorized.[43]

IV. North Carolina's Racial Gerrymander Was Not "Narrowly Tailored"

The "strict scrutiny" test requires that the State not only have a "compelling interest" in using racial classifications but also "narrowly tailored" the remedy.[44] The legislative history gives no indication that the General Assembly considered "less intrusive means" than majority-black districts for obtaining compliance with the Voting Rights Act. For example, the legislative history gives no indication that the General Assembly ever considered what might be the effect of the law enacted in 1989 which dispensed with a second primary when a candidate had received over 40% of the vote in the first primary. See N.C.G.S. § 163-111. Likewise, apparently no consideration was given to whether "plurality-black districts" might suffice.[45] As a result of the perceived

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[43] Allowing compliance with § 2 to serve as a "compelling interest" to justify North Carolina's racial gerrymanders contradicts the specific proviso in § 2. Also, it creates the constitutional tension between the Fourteenth and Fifteenth Amendments that *Miller* sought to avoid. Blumstein, *supra* n. 40, at 587, n. 430.

[44] Thus in *Wygant* it was noted that "other, less-intrusive means of accomplishing similar purposes -- such as the adoption of hiring goals -- are available." 476 U.S. at 284-85.

[45] Moreover, from the outset the General Assembly did not consider to what extent African Americans might be elected to Congress if traditional districting principles -- such as geographical

inflexible "max-black" policy of the Civil Rights Division -- the policy which *Miller* later held to be illegal -- the General Assembly focused solely on creating majority-black districts and ignored all alternatives. In so doing, it inexcusably neglected the constitutional requirement of "narrow tailoring;" and therefore, the racial gerrymander must fail the "strict scrutiny" test.

In *Wygant* Justice O'Connor emphasized the need for "the most exact connection between justification and classification." 476 U.S. at 285. However, in North Carolina's redistricting plan, no "exact connection" was made between areas where violations of the Voting Rights Act had occurred and the census blocks that the computer placed in the First and Twelfth Districts. For example, Durham County -- where the Shaw Appellants reside -- has never been subject to § 5 preclearance and there is no evidence of any past[46] or present[47] violation of the rights of African Americans in Durham to participate in the

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compactness and community of interest -- were used; if incumbency protection were abandoned; if blacks and Native Americans were grouped in a "minority-white" district; if Congress were requested to amend 2 U.S.C. § 2c; or if racial data were removed from the computer program used in drawing the congressional districts.

[46] By 1960, 62% of Durham's eligible black population was registered to vote. Keech & Sistrom, *North Carolina*, in *Quiet Revolution in the South* 159 (C. Davidson & B. Grofman eds.) (Princeton University Press, 1994). In *Thornburg v Gingles*, *supra*, the Court reversed the lower court's decision that single-member districts must be used in electing state legislators from Durham County.

[47] Thus, as a result of the election on November 7, 1995, eight of the thirteen members of the Durham City Council are black, although a majority of Durham's voters are white. See Durham, North Carolina *Herald-Sun*, A1, November 8, 1995.

political process. Nonetheless, most of Durham's African Americans were placed in the Twelfth District.[48]

CONCLUSION

Shaw and *Miller* would be flouted if the Court upheld North Carolina's flagrant racial gerrymander -- a regression to "segregation" that was the direct offspring of the lawless "maximization policy" enforced by the Civil Rights Division. The judgment below should be set aside, and an order entered to require the swift elimination of North Carolina's race-based redistricting plan.

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[48] Since Winston-Salem and Charlotte are both in counties which were never subject to preclearance under § 5, the placement in the Twelfth District of African Americans residing in those cities also reveals the General Assembly's lack of any effort or intent to make an "exact connection" between the racially-drawn district boundaries and the State's alleged "compelling interest" in compliance with the Voting Rights Act. The same deficiency is demonstrated by the transfer of a substantial concentration of Winston-Salem blacks from the "urban" Twelfth District to the more "rural" Fifth District. Appellees have also defended the redistricting plan as "narrowly tailored" because it protected "incumbents." However, the protection of "white incumbents" is inconsistent with the "narrow tailoring" of a redistricting plan to allow greater opportunity for African Americans to be elected to Congress.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

RUTH O. SHAW, ET AL., APPELLANTS

v.

JAMES B. HUNT, JR., GOVERNOR OF NORTH CAROLINA, ET AL.

JAMES ARTHUR "ART" POPE, ET AL., APPELLANTS

v.

JAMES B. HUNT, JR., GOVERNOR OF NORTH CAROLINA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

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QUESTION PRESENTED

The United States will address the following question:

Whether North Carolina's Congressional District 12 is narrowly tailored to further compelling state interests.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-923

RUTH O. SHAW, ET AL., APPELLANTS

v.

JAMES B. HUNT, JR., GOVERNOR OF NORTH CAROLINA, ET AL.

No. 94-924

JAMES ARTHUR "ART" POPE, ET AL., APPELLANTS

v.

JAMES B. HUNT, JR., GOVERNOR OF NORTH CAROLINA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

INTEREST OF THE UNITED STATES

This case requires the Court to construe and apply the Voting Rights Act of 1965, 42 U.S.C. 1971, 1973 *et seq*. The United States, acting through the Department of Justice, has been given a direct role in the enforcement of the Voting Rights Act and has an interest in its continuing effectiveness. The case also requires the Court to construe the Equal Protection Clause of the Fourteenth Amendment as it relates to race-conscious districting. The United States has a significant interest in that issue for the same reasons.

STATEMENT

1. North Carolina has a long history of racial discrimination against blacks in voting. That history has included use of techniques such as a poll tax, a literacy test, a prohibition against bullet voting, and designated seats for multi-member districts. See *Thornburg* v. *Gingles*, 478 U.S. 30, 38-39 (1986); see also *Gingles* v. *Edmisten*, 590 F. Supp. 345, 359-374 (E.D.N.C. 1984), aff'd in part, rev'd in part *sub nom. Thornburg* v. *Gingles*, 478 U.S. 30 (1986). The effects of that racial discrimination, including low black voter registration, continued long after the State abandoned those devices:[1] "[H]istoric discrimination in education, housing, employment, and health services * * * resulted in a lower socioeconomic status for North Carolina blacks as a group than for whites"; that lower status "both gives rise to special group interests and hinders blacks' ability to participate effectively in the political process and to elect representatives of their choice." 478 U.S. at 39.

Overt racial appeals have occurred in many election campaigns in North Carolina, including United States senatorial and state gubernatorial races as late as the 1950s and 1960s. J.A. 613-616. Racial appeals continued through the 1970s and 1980s and have persisted even in the 1990s. J.A. 616-620, 623-624. During the 1990 United States senatorial race, for example, African-American voters received postcards containing misinformation about

[1] Because of the use of tests and devices in the state voting process, and low voter registration or participation, 40 of the counties in North Carolina are covered by Section 4(b) of the Voting Rights Act of 1965, 42 U.S.C. 1973b(b); 28 C.F.R. Pt. 51, App. A.

state voting laws, designed to intimidate those voters from voting. J.S. App. 94a n.57.[2]

Voting choices in North Carolina have been and continue to be significantly polarized by race. See J.A. 575-597. Reviewing evidence of that phenomenon in *Gingles*, 478 U.S. at 52-61, 80-82 (Appendix A), this Court concluded that statistical evidence clearly established that black voters in the State are politically cohesive and that white bloc voting usually led to defeat of candidates who were supported by black voters. *Id.* at 59. Evidence in the instant case, based on the same methodologies, see J.A. 576, established that this phenomenon persists. J.A. 575-597 (Exh. 404).

Racial discrimination has directly affected the congressional districting process in North Carolina. See J.A. 621-624. After 1965, as black voting was becoming a significant political factor, state legislators split a potential congressional district because it would have given substantial political power to black voters; the legislature instead created a racially gerrymandered district that deliberately minimized the voting power of black citizens for years. J.A. 621-622. After the State's initial 1981 redistricting effort attempted to perpetuate that deliberate discrimination and met a Section 5 objection, the State finally created a district in the northeast part of the State with a population that was 40% black. J.A. 622-623. The minority-preferred candidate who ran for Congress in 1982 in the reconfigured district was defeated in the Democratic primary by a white candidate who used appeals long associated with racial politics in the State. See J.A. 623.

[2] A suit brought by the United States, alleging intimidation in violation of 42 U.S.C. 1971(b) and 1973i(b), was settled by consent decree on February 27, 1992. *United States* v. *North Carolina Republican Party*, No. 91-161-CIV-S-F (E.D.N.C.).

All three of the other African Americans who ran for Congress from North Carolina in the 1980s were defeated by white incumbents. J.A. 66-67. Prior to the 1992 congressional redistricting plan at issue in this case, the last African American in the United States Congress from North Carolina had served from 1897 to 1901, representing the old "Black Second" district in the northeast part of the State. Stip. ¶ 130.

2. As a result of the 1990 decennial census, North Carolina became entitled to an additional congressional seat, thus increasing the number of its congressional districts from 11 to 12. The State's population as of that census was 6,628,637. Approximately 22% of that population is African-American and 1.2% is American Indian. J.S. App. 82a. There are "major, discrete concentrations of African-American population throughout the state, the most significant ones of which, reflecting historical forces dating from slavery," are located in the "heavily rural, agricultural northeast" area of the Coastal Plain, and "in the historic 'black sections' of the state's five largest cities and of the other smaller cities" all located in the Piedmont region. *Id.* at 83a; Exh. 415 (map). The eastern Coastal Plain, the Piedmont region, and the western mountains constitute three distinct geographic regions of the State, each with its distinctive history, culture and economy. *Shaw* v. *Reno*, 113 S. Ct. 2816, 2820 (1993); see also J.S. App. 82a; J.A. 167-168.

In 1991, the North Carolina General Assembly redistricted the State into 12 congressional districts. From the outset of the process, members of the legislature debated whether any black opportunity districts should be created. J.S. App. 85a.[3] Some legislators believed that

[3] An opportunity district is a district in which the relevant minority group has a meaningful opportunity to elect the representative of its choice, despite racial discrimination in voting, either because the group constitutes a voting majority in the district or because it constitutes a sizable minority that can elect its preferred candidate because some non-minority voters will be willing to vote for the minority-preferred candidate.

they might be legally obliged to draw two such districts to comply with the Voting Rights Act. *Ibid.*; J.A. 402-403. Other legislators resisted drawing any such districts. The Democratic-controlled state legislature sought to craft as many districts as possible containing a majority of Democratic voters. See *Shaw* v. *Reno*, 113 S. Ct. at 2841 n.10 (White, J., dissenting). Legislators also sought to protect incumbents. The legislature ultimately set forth standards to govern the redistricting process. Those included equality of district population, conformity of districts with the Constitution and the Voting Rights Act, contiguity of districts, and preserving, where possible, census block and precinct integrity. J.S. App. 84a. Neither compactness nor preservation of political subdivisions was adopted as a districting criterion. See Stip. Exh. 9.

State House and Senate subcommittees were charged with developing the redistricting plan. They prepared a series of plans which, beginning in May, 1991, were discussed in committee, at public hearings and on the floor of the state House and Senate. J.S. App. 85a. The committees' plans each contained one black opportunity district, District 1, centered in the large rural area of the Coastal Plain. *Ibid.*; J.A. 50-54; see Stip. Exh. 10. In June, David Balmer, a Republican state representative, submitted to the House subcommittee an alternative plan that contained two black opportunity districts, Districts 1 and 12. The location of Balmer's District 1 was similar to that

of the subcommittees' District 1; Balmer's District 12 was located in the southern part of the State, beginning in Charlotte and extending southeast to Wilmington.[4] The House ultimately rejected a refinement of Balmer's two-black-opportunity-districts plan. J.A. 51-52. Balmer later submitted a second alternative plan containing two black opportunity districts located in the northeast part of the State. J.A. 54; Stip. Exh. 10, attachment C-27R-6. The House also rejected this plan. J.A. 54. During this process, civil rights groups joined Republicans in advocating that a second black opportunity district be included in the districting plan. J.A. 54. Democrats tended to oppose a second black opportunity district because the plans containing such a district seemed designed to further Republicans' partisan interests. See J.S. App. 80a.

The Democratically controlled legislature ultimately enacted a plan that became Chapter 601 of the 1991 Session Laws. J.S. App. 86a; J.A. 53-54. That plan's single black opportunity district, District 1, was centered in the rural northeast portion of the Coastal Plain with an arm extending westward to inner-city Durham. See J.S. App. 86a.

Chapter 601 was submitted for preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. J.S. App. 86a. Republican Members of Congress from North Carolina had written to the Department of Justice contending that the plan violated the Voting Rights Act. J.A. 174-175. Representative Balmer also urged rejection of Chapter 601 because it violated the Act. J.A. 78-90. He stated that there were several ways to draw

[4] Balmer's District 12 had a population that was 48% African-American and 8% American Indian. See Stip. Exh. 10, attachment C-27R-4. Representative Balmer believed that these groups would vote cohesively for minority-preferred candidates in general elections. Exh. 200, at 1005-1006.

two minority opportunity districts and that Chapter 601 diluted minority voting strength. J.A. 79-81. Balmer provided statistics supporting that claim as well as maps of alternative plans. J.A. 82-90. Various other entities wrote the Attorney General urging denial of preclearance. See J.A. 55.

The Attorney General, after conducting an independent analysis of the State's redistricting process, objected to Chapter 601. J.A. 147-154. In the December, 1991, objection letter, the Assistant Attorney General for the Civil Rights Division stated that a plan cannot be precleared "where the legislature has deferred to the interests of incumbents while refusing to accommodate the community of interest shared by insular minorities." J.A. 148, citing *Garza* v. *County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991); *Ketchum* v. *Byrne*, 740 F.2d 1398, 1408-1409 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985). He noted that the legislature had been presented with plans that included a second minority opportunity district that appeared to give effect to significant minority voting strength. J.A. 152-153. Those plans had boundaries no more irregular than some district boundaries already found in Chapter 601. J.A. 152. The Assistant Attorney General concluded that the reasons given by the State for rejecting the alternative plans appeared pretextual, emphasizing that it was "alleged that the state's decision to place the concentrations of minority voters in the southern part of the state into white majority districts attempts to ensure the election of white incumbents while minimizing minority electoral strength." J.A. 153.

3. The North Carolina legislature convened on December 30, 1991, to consider what action to take in view of the Section 5 objection. Representative Balmer submitted for consideration a plan containing a second black opportunity

district in the Piedmont area. Stip. ¶ 82; J.A. 58; Exh. 416 (map). At the prompting of the Member of Congress whose incumbency was threatened most by Balmer's earlier plans, a variation on this plan was modified and a version of it was introduced at a public hearing. J.A. 58-59.

The legislative debate about whether to create black opportunity districts resumed. There was also debate about whether to seek judicial preclearance for Chapter 601. Several Democrats urged such a suit, while Republicans urged that no suit be brought and that two black opportunity districts be created. J.S. App. 88a; J.A. 57. One legislator invoked the State's long history of discrimination against African Americans in voting, asserted that this discrimination was still in need of correction, and that it was the reason for the Voting Rights Act and the *Gingles* decision. Exh. 200, at 902, 908-909, 956-957; J.A. 215-220, see also J.A. 212-214, 236-237; J.S. App. 89a-90a. Others mentioned the possibility that the State would be sued under *Gingles* (Section 2) if only one black opportunity district was created, Tr. 692, and some believed that the Section 5 objection was valid, J.A. 209-210. *Gingles* and its implications were discussed by staff, on the floor and at community hearings. Tr. 692.

Some members of the public testified at hearings that the major urban areas in the State should be placed together in a district in the Piedmont because that would enhance urban voting strength and would also "enhance[] the political power of the small, rural counties by removing the large metropolitan areas from their districts, and an overwhelming influence in the electoral process with them. This allows a better distribution of political power throughout the state." J.A. 189-190. Various legislators agreed. See J.A. 193, 203-205, 266, 410-412. Others urged a black opportunity district in the southeast (Exh. 200, at 595), contending that there was a compact

minority district that the legislature had not recognized because it was too concerned with partisan politics (*id.* at 898), and asserting that action recognizing black population concentrations should have been taken regardless of the position of the Attorney General. See J.A. 210, 211-225. The Piedmont plan was more attractive to Democrats than other two-black-opportunity-district plans because it might enhance their chances of winning additional congressional seats. J.A. 157.

The State's redistricting expert made the proposed Piedmont district more urban by modifying it so that 80% of its residents live in cities with populations of 20,000 or more. He made the other black opportunity district more rural by modifying it so that 80% of its residents live outside areas with 20,000 or more people. J.S. App. 97a, 100a. Further refinements to the ultimate shape of the two districts were made to respond to incumbency protection and the need to meet the equal population requirement. See *id.* at 97a-101a, 109a. The plan was then sent to the legislature.

The North Carolina General Assembly adopted this plan on January 24, 1992. J.S. App. 101a. The plan was precleared by the Attorney General on February 6, 1992. J.A. 61. An election based on the new plan took place on November 3, 1992. African Americans were elected to the United States House of Representatives from the two black opportunity districts that the plan contains. They are the first blacks to serve as Members of Congress from North Carolina since 1901.

4. a. Plaintiff-appellants are five white registered voters who reside in Durham County, North Carolina, two of whom vote in District 12. *Shaw* v. *Barr*, 808 F. Supp. 461, 462, 464 (E.D.N.C. 1992). They filed suit challenging the redistricting plan as unconstitutional. They named as defendants the North Carolina Governor, the Board of

Elections and other state officials, J.S. App. 10a, all of whom are appellees. A three-judge panel dismissed the action against the state officials, concluding that appellants had failed to state a cause of action under the Equal Protection Clause. *Shaw* v. *Barr*, 808 F. Supp. at 469-473.

This Court reversed, holding that the plaintiff-appellants had "stated a claim under the Equal Protection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification." *Shaw* v. *Reno*, 113 S. Ct. at 2832. The Court noted that "[i]f the allegation of racial gerrymandering remains uncontradicted, the District Court further must determine whether the North Carolina plan is narrowly tailored to further a compelling governmental interest." *Ibid.*

b. On remand, the district court permitted intervenors on both sides of the suit and the case proceeded to trial before the three-judge court. Extensive evidence was submitted through live testimony, written statements, exhibits, maps and stipulations. J.S. App. 14a-15a & n.8.

The district court considered, as a threshold matter, whether North Carolina's plan must be subjected to strict scrutiny. J.S. App. 26a-38a. The court held that strict scrutiny is triggered when "racial considerations played a 'substantial' or 'motivating' role in the line-drawing process." *Id.* at 34a. Because the State conceded that it deliberately drew two districts so that African-American citizens had a voting majority in each, the court concluded that the plan required strict scrutiny. *Id.* at 110a.

c. Applying strict scrutiny, the district court held that North Carolina had a compelling interest in engaging in race-conscious redistricting in order to comply with

Sections 2 and 5 of the Voting Rights Act. J.S. App. 108a, 111a-113a. In the court's view, a State "has a 'compelling' interest in engaging in race-based redistricting to give effect to minority voting strength whenever it has a 'strong basis in evidence' for concluding that such action is 'necessary' to prevent its electoral districting scheme from violating the Voting Rights Act." *Id.* at 45a, citing *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500 (1989); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 274-275 (1986) (opinion of Powell, J.). Such a basis is present when the State "has information sufficient to support a *prima facie* showing that its failure to [engage in race-conscious redistricting] would violate the Act." J.S. App. 48a, citing *Croson*, 488 U.S. at 500; *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring in part and concurring in the judgment); *Johnson* v. *Transportation Agency*, 480 U.S. 616, 650-652 (1987) (O'Connor, J., concurring in the judgment). A prima facie case of a violation of Section 2 would be established by evidence of the so-called *Gingles* preconditions. J.S. App. 49a-50a, citing *Growe* v. *Emison*, 113 S. Ct. 1075, 1084 (1993); *Voinovich* v. *Quilter*, 113 S. Ct. 1149, 1157 (1993); *Johnson* v. *DeGrandy*, 114 S. Ct. 2647, 2658-2662 (1994).

With regard to reliance on Section 5 as a compelling state interest where the Department of Justice denies preclearance to a challenged plan because of the plan's failure to create additional minority opportunity districts, the court held that the State must be able to demonstrate that it conducted its own independent reassessment of the plan and reasonably concluded that the Department's objection was legally and factually supportable. J.S. App. 54a. The court stated that a State may also have a compelling interest in engaging in race-conscious redistricting in order to eradicate the effects of past or present racial discrimination in the political process, if

the State has a strong basis in evidence for believing that such remedial action is necessary to accomplish that result. *Id.* at 55a-57a & n.35, citing, *inter alia*, *Shaw* v. *Reno*, 113 S. Ct. at 2831-2832.

The district court then found that North Carolina in fact had a well-founded belief that a districting plan that contained only one black opportunity district would violate Section 2. J.S. App. 108a, 111a. That finding was based on extensive evidence, including the following: Numerous districting plans had been presented to the legislature that included two geographically compact black opportunity districts. *Id.* at 90a-93a. The legislative leadership recognized that the facts and circumstances could support a challenge to any single-minority-district plan under *Gingles*. *Id.* at 91a-92a. The Republican Party, the ACLU and other groups contended that Chapter 601 violated Section 2 because it had only one black opportunity district. *Id.* at 91a. Special counsel to the Republican Party had warned at a public hearing that failure to create two black opportunity districts might well lead to a federal court drawing the districts. *Id.* at 92a. The Justice Department had refused to preclear Chapter 601, believed that two black opportunity districts meeting the *Gingles* requirements could be drawn, and that the failure to do so would constitute impermissible vote dilution. *Ibid.* Legislators had personal experience in North Carolina politics (including the previous Section 2 litigation in *Gingles*) and one black opportunity district did not approach proportionality with African Americans' percentage of the State population. *Id.* at 92a. In addition, the court found that evidence at trial established the existence of the three *Gingles* preconditions—a sufficiently large and geographically compact population of African Americans that was politically cohesive, and widespread and persistent racial bloc voting that usually

defeated minority-preferred candidates. *Id.* at 92a-93a. That evidence confirmed that the State had a firm basis in evidence for believing that its creation of a second black opportunity district was required to avoid violating Section 2. *Id.* at 93a, 111a.

The district court also found that the State had conducted its own independent reassessment of Chapter 601 after denial of preclearance, and had a well-founded belief that the evidence relating to a potential Section 2 violation also established that the Attorney General's Section 5 objection to a one-minority-opportunity-district plan was "legally and factually supportable." J.S. App. 108a, 111a-112a. Finally, the court concluded that there was some "sentiment" in the legislature that creation of two black opportunity districts was also required as a remedy for the State's long and continuing history of voting-related race discrimination. *Id.* at 89a-90a. That sentiment, however, was not sufficient "in voting power" to cause the creation of the two districts "independent of the perceived compulsion of the Voting Rights Act." *Id.* at 108a.

d. The district court then concluded that North Carolina's two black opportunity districts were narrowly tailored to meet the State's compelling interests. J.S. App. 113a. That holding was supported by a number of factual findings including the following: The State did not create more black opportunity districts than reasonably necessary to comply with the Voting Rights Act. *Ibid.* The African-American voting majorities in the districts the State created were no greater than reasonably necessary to afford such citizens a reasonable opportunity to elect candidates of their choice. *Ibid.* The State's two-district plan (2 out of 12 seats, or 16.7%) is reasonably related to the percentage of African-American voters in the State (22%). *Ibid.* The two-district plan would

necessarily be reconsidered at the time of the next decennial census, and would therefore last no longer than reasonably necessary to eliminate the effects of the discrimination it is aimed at redressing. *Ibid.* The court found, finally, that the plan does not impose an undue burden on innocent third parties, because the districts it creates comply with all constitutionally mandated principles, are based on rational districting principles that ensure fair and effective representation to all citizens, and were "designed to be and are in fact highly homogeneous in terms of their citizens' material conditions and interests, and do not significantly inhibit access to and responsiveness of their elected representatives." *Id.* at. 113a-114a.

Chief District Judge Voorhees dissented from the court's conclusion that strict scrutiny was satisfied.

SUMMARY OF ARGUMENT

A. North Carolina had a compelling interest in creating two black opportunity districts to comply with Section 2 of the Voting Rights Act. The district court correctly found that the State believed, and had a strong basis in evidence for believing, that such districts are required because (1) blacks in North Carolina are sufficiently numerous and geographically concentrated to have the potential to elect candidates of their choice in two reasonably compact districts; (2) black voters in North Carolina are politically cohesive; (3) the white majority usually votes sufficiently as a bloc to enable it to defeat the black minority's preferred candidate; and (4) the failure to create two such districts would leave minority group members substantially underrepresented when compared to their percentage in the population. *Gingles*, 478 U.S. at 50-51; *DeGrandy*, 114 S. Ct. at 2658. Those

factual findings are supported by substantial evidence and are not clearly erroneous.

B. North Carolina also had a compelling interest in complying with Section 5 of the Act. The district court found that the State conducted its own independent reassessment of Chapter 601 after denial of preclearance and reasonably concluded that the Department of Justice's Section 5 objection to the State's plan was legally and factually supportable. Those factual findings are also supported by substantial evidence and are not clearly erroneous.

C. The district court correctly found District 12 to be narrowly tailored to further the State's compelling interests. The court found that the State did not use race more than was necessary to carry out the compelling state interest and that any departures from its traditional districting principles were no greater than necessary to serve its compelling interests.

The State was not foreclosed from drawing the two black opportunity districts in locations different from the precise district configurations underlying potential Section 2 liability. To foreclose a State from using nonracial districting criteria in implementing its obligation to create minority opportunity districts would seriously undermine voluntary compliance with the Voting Rights Act. Here, state interests in protecting incumbency and in having districts reflect communities of interest among district residents were served by the location and shape of District 12. Geographic compactness was not adopted as one of North Carolina's statutory districting criteria and the departures from compactness here were made in response to legitimate, nonracial districting interests.

ARGUMENT

The district court held that minority opportunity voting districts are subject to strict scrutiny if "racial considerations played a 'substantial' or 'motivating' role in the line-drawing process, even if they were not the only factor that influenced that process." J.S. App. 34a. This decision appears to be in conflict with this Court's subsequent decision in *Miller* v. *Johnson*, 115 S. Ct. 2475 (1995).

In *Miller*, the Court held that strict scrutiny is triggered when "race was the *predominant* factor motivating the legislature's decision to place a significant number of voters within or without a particular district." 115 S. Ct. at 2488 (emphasis added). "To make this showing, a plaintiff must prove that the legislature *subordinated traditional race-neutral districting principles*." *Ibid.* (emphasis added). A plaintiff satisfies this "demanding" threshold standard only where he or she can "show that the State has relied on race *in substantial disregard of customary and traditional districting practices*." *Id.* at 2497 (O'Connor, J., concurring) (emphasis added).

No such showings were made here. Nor did the district court determine, in deciding that strict scrutiny was applicable, that race was the predominant factor motivating the creation of District 12, or that the North Carolina legislature subordinated its own race-neutral districting principles in the creation of the District. Accordingly, the United States joins the contention made by appellees that the district court incorrectly concluded that strict scrutiny was applicable. The Court need not address that question, however, because the district court correctly held that the State's redistricting plan satisfies strict scrutiny. See *United States* v. *Paradise*, 480 U.S. 149, 166-167 (1987) (opinion of Brennan, J.) (declining to decide

whether court-ordered race-conscious relief was subject to strict scrutiny because the relief ordered satisfied such scrutiny).

NORTH CAROLINA'S CONGRESSIONAL DISTRICT 12 IS NARROWLY TAILORED TO FURTHER COMPELLING STATE INTERESTS

The district court correctly held that a State has a compelling interest in creating minority opportunity districts if the State has a strong basis in evidence for believing that such action is necessary to comply with Section 2 or Section 5 of the Voting Rights Act. See J.S. App. 45a, 48a. This Court has repeatedly recognized that both the federal and state governments have a compelling interest in eliminating racial discrimination and its lingering effects. *Shaw* v. *Reno*, 113 S. Ct. at 2831-2832; *Adarand Constructors, Inc.* v. *Pena*, 115 S. Ct. 2097, 2117 (1995); *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 604 (1983). The Voting Rights Act was adopted to further that interest by "banish[ing] the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). In the words of the district court, "the Supreme Court has recognized consistently that the Voting Rights Act is the single most important piece of federal anti-discrimination legislation ever passed by Congress—enacted, and then twice extended, with the avowed purpose of putting a stop to nearly a century of '"unremitting and ingenious defiance" of the commands of the Fifteenth Amendment' by the states." J.S. App. 45a-46a, quoting in part *McCain* v. *Lybrand*, 465 U.S. 236, 243 (1984).

This Court has not yet specifically addressed the question whether compliance with the Voting Rights Act, standing alone, can constitute a compelling state interest

for race-conscious redistricting. See *Miller*, 115 S. Ct. at 2490-2491. The answer to that question must, we believe, be an affirmative one. As the district court below observed, the Court has recognized that a State's compelling interest in eradicating the effects of its own past or present racial discrimination "extends to remedying past or *present violations of federal statutes* that are designed to eradicate such discrimination in particular aspects of life." J.S. App. 44a (emphasis added), citing *Croson*, 488 U.S. at 500 ("constitutional or statutory violation[s]"); *Wygant*, 476 U.S. at 274-275 (opinion of Powell, J.) (Title VII); *id.* at 289 (O'Connor, J., concurring in part and concurring in the judgment) ("violation[s] of federal statutory or constitutional requirements"); *Regents of Univ. of California* v. *Bakke*, 438 U.S. 265, 307-309 (1978) (opinion of Powell, J.) ("constitutional or statutory violations"). Both the background of the Voting Rights Act and this Court's precedents thus establish that a State has a compelling interest in taking race-conscious action to protect minority voting rights from dilution when to act otherwise would violate the Voting Rights Act. We refer the Court to our more detailed discussion of that legal issue in the brief for the United States in *Bush* v. *Vera*, No. 94-805, *Lawson* v. *Vera*, No. 94-806, and *United States* v. *Vera*, No. 94-988, prob. juris. noted (June 29, 1995), a copy of which was filed on August 28, 1995 (Gov't Vera Br.). See also J.S. App. 46a-47a.

Nor need a State await an official finding that it is "guilty of past or present discrimination before embarking on a voluntary program of remedial action * * * so long as it has a 'strong basis in evidence' for concluding that such remedial action is 'necessary.'" J.S. App. 44a-45a, citing, *inter alia*, *Croson*, 488 U.S. at 500, and *Wygant*, 476 U.S. at 277 (opinion of Powell, J.); J.S. App. 48a; see also *Miller*, 115 S. Ct. at 2491. The "strong basis in evidence" standard encourages voluntary compliance with the law by providing States with a margin of safety against the "competing hazards" of liability to minorities, if they do not create minority opportunity districts, and liability to others, if they do. *Wygant*, 476 U.S. at 291 (opinion of O'Connor, J.). When States voluntarily comply with the Voting Rights Act, they retain the flexibility to weigh other state interests and competing political pressures in the redistricting process. *Miller*, 115 S. Ct. at 2488.[5]

A. North Carolina Had A Compelling Interest In Creating Two Black Opportunity Districts In Order To Comply With Section 2 Of The Voting Rights Act

1. Appellants contend (Shaw Br. 31; Pope Br. 28) that avoiding a Section 2 violation cannot be the compelling interest supporting the State's redistricting plan in this case because that purpose is not expressed in the legislative history or the legislation itself. As the district court found, however, the legislative history of the North Carolina plan clearly reveals concerns about a possible violation of Section 2, as well as awareness of the existence of the factors that would prove a Section 2 case. See page 12, *supra*. Appellants' argument is, in all events, premised on a misunderstanding of the "close examination of legislative purpose," *Croson*, 488 U.S. at 495, in which

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[5] Two of the five plaintiffs live in District 12; none live in District 1. See *Shaw* v. *Reno*, 113 S. Ct. at 2821. None of the plaintiff-intervenors live in either District 12 or District 1. Accordingly, if the plaintiffs have standing (but see State Br. 28-31 and Intervenor Appellees Br. 6-13 (arguing that appellants do not have standing to challenge either District)), it is standing to challenge the validity only of District 12, not District 1. See *United States* v. *Hays*, 115 S. Ct. 2431 (1995). In any event, District 1, like District 12, is narrowly tailored to further the State's compelling interests.

the Court engages when reviewing classifications under heightened scrutiny.

The inquiry into a statute's purpose is not resolved by looking exclusively at the public pronouncements of legislators. Rather, the inquiry requires "an examination of the factual basis for [the statute's] enactment and the nexus between its scope and that factual basis." *Croson*, 488 U.S. at 494-495 (opinion of O'Connor, J.). In this case, the district court found that the redistricting plan was in fact enacted because of a well-founded belief by a majority of the legislature that failing to include a second black opportunity district might violate Section 2. J.S. App. 108a.

2. There was ample evidence to support the district court's finding that the North Carolina legislature acted because of a belief that the State would violate Section 2 if it did not create two black opportunity districts in its 1991 redistricting plan.[6] It found that legislators were well aware of contentions that plans that contained only one black opportunity district would result in vote dilution—a Section 2 violation. J.S. App. 90a-91a. It found it especially pertinent that "[w]ell over half the members of the 1991 General Assembly had been members of the 1986 General Assembly, which had been required by a federal court in the *Gingles* litigation to create 8 State House and Senate majority-minority districts in order to remedy violations

[6] Appellants contend that the district court erred in placing the burden of persuasion on them. They claim that "once racial gerrymandering had been established, the burden of producing evidence and the burden of persuasion should both have rested on the Appellees." Shaw Br. 17, 45-47; Pope Br. 14-15, 19-23. The district court correctly rejected this argument. J.S. App. 42a-43a; see also State Br. 37-38. In all events, it does not appear that any of the district court's findings of fact depend on its allocation of the burden of proof. See, *e.g.*, J.S. App. 93a (finding that "overwhelming," "undisputed," and "considerable" evidence established the existence of the three *Gingles* preconditions).

of amended § 2." *Id.* at 90a. The district court concluded that, "[b]eyond any question," the dominant concern behind enactment of the final redistricting plan was "a perception that * * * the Chapter 601 plan, and any other congressional redistricting plan which did not contain at least two majority-minority districts, would in fact violate the Voting Rights Act (or be so likely to violate the Act that in prudence it must be assumed to do so)." *Ibid.* That factual finding is not open to serious challenge.

The district court also found that the legislature reasonably believed that conditions in North Carolina were such that a Section 2 case could likely be made against any redistricting plan that did not contain two black opportunity districts. J.S. App. 91a. The concerns that legislators expressed during debates that led to enactment of the final plan directly reflected the factors necessary to establish a Section 2 violation under *Gingles*. *Id.* at 91a-92a. Evidence adduced at trial confirmed that a successful Section 2 case could be brought if two black opportunity districts were not created. *Id.* at 92a-93a. Ample evidence supports the district court findings as to the reasonableness of the legislature's belief in the credibility of a Section 2 challenge; none of the findings can plausibly be deemed clearly erroneous. See *Miller*, 115 S. Ct. at 2489 (applying clearly erroneous standard to review of district court's findings regarding what factors motivated legislature in drawing redistricting plan); *Gingles*, 478 U.S. at 79 (findings of fact regarding elements of Section 2 claim are subject to review only for clear error).

The evidence presented both before the General Assembly and at trial showed that it was possible in North Carolina to draw two reasonably compact districts with sufficient black population to provide black voters the opportunity to elect candidates of their choice in those

districts, and the district court so found. When it enacted Chapter 601, the State had already determined that the concentration of African Americans in the northeast Coastal Plain required at least one black opportunity district. There also were significant concentrations of African Americans in other parts of the State, most obviously in Charlotte in Mecklenburg County. Plans prepared by appellants' own expert witnesses contained two black opportunity districts that were " 'geographically compact' under any reading of *Gingles*." J.S. App. 93a (referring to plans designated Shaw II and Shaw III).

The district court also found that North Carolina had a strong basis for believing that the other *Gingles* preconditions were met. The evidence of the political cohesiveness of the African-American population in North Carolina was undisputed. J.S. App. 93a. Under a redistricting plan that contained only one black opportunity district, African Americans in North Carolina also would not approach a level of representation proportionate to their percentage in the State's population. *Id.* at 92a.

Finally, the evidence also established that whites engage in significant bloc voting against black-preferred candidates. J.S. App. 93a. The district court specifically found that members of the legislature could not help but be aware of this phenomenon in light of their experience in running for office themselves and in observing other campaigns. *Id.* at 92a. The district court found that racial bloc voting persists in all the major areas of African-American population concentration. Appellees' expert witness, Dr. Richard L. Engstrom, analyzed all recent congressional elections in North Carolina (since 1980) in which an African-American candidate ran against a white candidate, as well as all statewide elections and state legislative elections since 1988 in which white and black candidates ran against one another. He found that racially

polarized voting persists across the State. J.A. 596-597. A number of the most polarized elections took place in state House or Senate districts that are included, in whole or in part, in either the enacted Congressional District 12 or the alternative proposed district that ran from Charlotte eastward. See Exh. 404, Tables 3A through 5C.[7]

B. North Carolina Also Had A Compelling Interest In Creating Two Black Opportunity Districts In Order To Comply With Section 5 Of The Voting Rights Act

A compelling state interest in complying with Section 5 of the Voting Rights Act also supported North Carolina's decision to establish two black opportunity districts in its congressional redistricting plan. The court below correctly found that the State had a firm basis in evidence for believing that its failure to adopt a plan containing two black opportunity districts would violate Section 5.

This case comes to the Court in a very different posture from that present in *Miller* v. *Johnson*. In seeking preclearance North Carolina had defended its adoption of Chapter 601, in lieu of one of the proffered alternative plans that included two black opportunity districts, by contending that the districts in the alternative plans were too lacking in compactness. A glance at the districts in the Chapter 601 plan, however, reveals the inaccuracy of that explanation because Chapter 601 contained majority-white districts that also lacked compactness. There was good reason for the Justice Department to believe, therefore, that incumbency, not compactness, was the interest the legislature had chosen to serve. Protection of incumbents, however, though generally a legitimate

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[7] Polarized bloc voting also was significant in state legislative districts that are incorporated, in whole or in part, in the other black opportunity district, Congressional District 1. See Exh. 404, Tables 3A through 5C.

districting consideration, *Gaffney* v. *Cummings*, 412 U.S. 735 (1973), can mask intentional discrimination against minority voters and cannot justify a plan that impermissibly dilutes minority voting strength. See *Garza*, 918 F.2d at 768 n.1, 771; *id.* at 778-779 (Kozinski, J., concurring and dissenting in part); *Ketchum*, 740 F.2d at 1406-1408; *Armour* v. *Ohio*, 775 F. Supp. 1044, 1060-1061 (N.D. Ohio 1991) (three-judge court); *Rybicki* v. *State Bd. of Elections*, 574 F. Supp. 1082, 1103 & n.64, 1109 (N.D. Ill. 1982) (three-judge court).

The Department of Justice thus denied North Carolina preclearance for Chapter 601 because the State failed to meet its burden of demonstrating that the plan did not violate the purpose prong of Section 5. J.S. App. 51a n.29; *id.* at 51a-54a & n.30. That prong prevents preclearance in cases where a State has failed to show that its proposed plan was not designed to dilute minority voting strength. *City of Port Arthur* v. *United States*, 459 U.S. 159, 168 (1982); *City of Richmond* v. *United States*, 422 U.S. 358, 378-379 (1975); see *Busbee* v. *Smith*, 459 U.S. 1166 (1983). The letter denying preclearance noted that one of the circumstances in which preclearance is denied is when "the legislature has deferred to the interests of incumbents while refusing to accommodate the community of interest shared by insular minorities." J.A. 148, citing *Garza*, 918 F.2d at 771; *Ketchum*, 740 F.2d at 1408-1409. The letter stated that "some commenters have alleged that the state's decision to place the concentration of minority voters in the southern part of the state into white majority districts *attempts to ensure the election of white incumbents while minimizing minority electoral strength.*" J.A. 153 (emphasis added). North Carolina was invited to provide convincing evidence to the contrary, but the State failed to do so. *Ibid.* The State's justification for

not creating more than one black opportunity district was deemed pretextual and preclearance was denied.

The interaction between North Carolina and the Department of Justice in this case does not in any respect reflect any "maximization" objective the Court found present in *Miller*. The district court in this case found as fact that North Carolina conducted its own independent reassessment of its plan in light of the Justice Department's concerns and reasonably concluded that the Department's objection was legally and factually supportable. J.S. App. 94a, 111a-1112a. That conclusion is corroborated by the fact that when the legislative leadership subsequently considered a proposal for a second minority opportunity district that would not hurt incumbents or radically shift the balance of political power, the leadership embraced that plan.[8]

C. District 12 Is Narrowly Tailored To Serve North Carolina's Compelling Interests

1. Appellants are wrong in their assertions (Shaw Br. 35-40; Pope Br. 40-45) that the State's plan fails the narrowly tailored inquiry because the black opportunity districts it created are not identical with those in the alternative plans that demonstrated that the State's initial

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[8] The district court also recognized that a State may have a compelling interest in creating minority opportunity districts in order to eliminate the discriminatory effects of past racial discrimination even when the Voting Rights Act may not require it. See J.S. App. 55a-57a. The court found that "[t]here was some patently honest sentiment, among both white and African-American legislators, that in view of the State's long history of race discrimination in voting matters persisting down to the present time, simple racial justice warranted [two black opportunity districts]." *Id.* at 89a. The court concluded, however, that a concern for remedial action, independent of a duty under the Voting Rights Act, would not have resulted in the creation of District 12. *Id.* at 108a.

plan was susceptible to a Section 2 challenge. Appellants' argument is based on a misunderstanding of the nature of Section 2's prohibition of the dilution of minority voting rights.

A Section 2 violation occurs when the members of a minority group are denied an equal opportunity to participate in the political process and to elect representatives of their choice. The Court's decision in *Gingles* identified three factors generally necessary to prove a Section 2 claim. The district court found that the State had a firm basis for believing that these factors were present here. The State thus had a compelling interest in adopting a plan that, based on a totality of circumstances, would ensure that the African-American minority was not denied the equal political participation that Section 2 guarantees.

Gingles indicates that one permissible response in such a situation is to draw geographically compact minority opportunity districts that the district court used in its *Gingles* analysis. But neither *Gingles* nor the Voting Rights Act compels that specific remedy. So long as the State adopts a plan that provides an equal opportunity to elect representatives of choice, Section 2 obligations are satisfied. See *Upham* v. *Seamon*, 456 U.S. 37, 42 (1982) (per curiam) (federal court must defer to a State's remedial plan so long as it satisfies the substantive requirements of federal law); cf. *McGhee* v. *Granville County*, 860 F.2d 110, 120-121 & n.11 (4th Cir. 1988) (county may remedy violation of Section 2 caused by multimember districts by increasing the size of the body or through limited voting scheme).

In this case, the district court found that the minority opportunity districts that the State adopted were designed to serve legitimate nonracial state interests, including incumbency and community of interest. There is no basis

for questioning the accuracy of this factual finding. In other contexts, this Court has accepted the principle that a State may choose less compact alternative districts if it wishes to protect incumbents. See *White* v. *Weiser*, 412 U.S. 783 (1973); *Burns* v. *Richardson*, 384 U.S. 73, 89 n.16 (1966). Compactness is not constitutionally required. *Shaw* v. *Reno*, 113 S. Ct. at 2827. As the district court noted, this Court "has repeatedly rejected claims that a state redistricting plan violates the Equal Protection Clause because it sacrifices [considerations such as geographical compactness, contiguity, and adherence to political subdivision boundaries] in order to achieve other legitimate redistricting objectives, such as protecting incumbents, preserving the integrity of established neighborhoods, and recognizing the voting strength of various political parties." J.S. App. 65a & n.42, citing *Gaffney*, 412 U.S. at 752 n.18; *White*, 412 U.S. at 793-797; *Wright* v. *Rockefeller*, 376 U.S. 52 (1964); see also *Shaw* v. *Reno*, 113 S. Ct. at 2827; *id.* at 2841 (White, J., dissenting); *id.* at 2843 (Stevens, J., dissenting); *id.* at 2849 (Souter, J., dissenting).

Moreover, the State's plan in this case does, in fact, incorporate in its two black opportunity districts substantial portions of the voters encompassed in the concentrations of minority voters that would have given rise to a Section 2 claim. District 1 contains the same core minority population from the northeast Coastal Plain that was included in a minority opportunity district in each of the alternative plans that were found by the district court to support a Section 2 suit. District 12, in turn, contains the heavy concentration of African Americans in Mecklenburg County, the same urban component included in the second minority opportunity district in some of the alternative plans. District 12 combines that population with other highly concentrated

urban populations that lie to the north, whereas the alternative districts combined the population with those living in rural areas to the east. The choice between a predominantly urban minority opportunity district and one that combines rural and urban populations is one that the State has discretion to make.

Adoption of appellants' argument would restrict a State to remedying Section 2 violations only by adopting compact districts that might not serve its legitimate districting principles. That would seriously undermine voluntary compliance with the Voting Rights Act and unduly impede the redistricting process. Here, the district court found that the legislature designed the districts in large part to protect incumbents, *id.* at 99a-100a; to create one distinctively rural opportunity district and one distinctively urban district, *id.* at 97a; to meet equal population requirements, *id.* at 98a; to create districts with different and distinctive communities of interest, *id.* at 103a; and to meet territorial contiguity, *id.* at 98a-99a. These are all legitimate state districting objectives.

2. In determining whether District 12 is narrowly tailored to serve the State's compelling interests, the district court looked to this Court's decisions applying a strict scrutiny standard to other types of race-conscious remedial measures and discerned a series of factors to guide its analysis. Those factors include: the efficacy of alternative remedies, the flexibility and duration of the remedy, the relationship of the remedial goal to the proportion of minority group members eligible to receive the benefit of the remedy, and the impact of the remedy on innocent third parties. J.S. App. 57a-64a; see also Gov't Vera Br. 35-37. Also relevant to the court was this Court's statement in *Shaw* v. *Reno* that a plan is not narrowly tailored if it goes "beyond what [is] reasonably

necessary" to achieve the State's compelling interests. 113 S. Ct. at 2831.

The district court made detailed factual findings regarding each of these factors. The court found that the State did not create more black opportunity districts than reasonably necessary to comply with the Voting Rights Act; that the African-American voting majorities in the districts it created are no greater than reasonably necessary to afford the group members a reasonable opportunity to elect candidates of their choice; that each district has only a bare African-American majority; and that the plan provides for minority representation (2 out of 12 seats, or 16.7%) reasonably related to the percentage of African-American population in the State (22%). See J.S. App. 113a.

The State's plan is of limited duration because it will be reconsidered at the time of the next decennial census and will therefore last no longer than reasonably necessary to eliminate the effects of the discrimination it is aimed at redressing. J.A. App. 61a, 113a. The plan does not impose an undue burden on innocent third parties. The districts comply with all constitutionally mandated principles, were based on rational districting principles that ensure fair and effective representation to all included citizens, and were "designed to be and are in fact highly homogeneous in terms of their citizens' material conditions and interests, and do not significantly inhibit access to and responsiveness of their elected representatives." J.S. App. 111a, 113a-114a.

The court found, finally, that the plan does not depart from the State's customary districting practices to such a degree that it indicates that race played more of a role than necessary to meet the compelling state interests. See J.S. App. 100a-101a, 109a, 113a. District 12 serves the legislature's partisan interests and incumbency concerns.

Id. at 100a-102a. It sits in an historically well-recognized geographic area of the State—the Piedmont—that contains urban populations with closely similar political interests.[9] It generally tracks the Piedmont's urban crescent, although it deviates from the crescent to include blacks living in urban areas of high population density in Winston-Salem. Those populations were included instead of the rural African-American populations in the northern counties in order to further the State's community-of-interest objective. See J.S. App. 100a-101a.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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OCTOBER 1995

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[9] Based on a study of 19 socioeconomic and demographic variables, District 12 is ranked second of the 12 North Carolina congressional districts in overall homogeneity; District 1 ranks fourth. Comparisons with districts in the 1982 plan placed current Districts 1 and 12 in the middle range in terms of overall homogeneity. Tr. 764-766; Exh. 401, at 13-14 (Tables 3 and 4). Based on a poll of people in Districts 1, 12, and 4 (chosen for its compactness) in which they ranked 11 issues in terms of their importance and responded to three questions about their support for certain public policies, District 12 is the most homogeneous of the three (Tr. 766-771), and District 1 ranks second. Exh. 401, at 21, 25.

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Nos. 94-923, 94-924

In the Supreme Court of the United States
October Term, 1994

Ruth O. Shaw, et al.,
Appellants,
v.
James B. Hunt, Jr., as Governor of the State of North Carolina, et al.,
Appellees.

James Arthur Pope, et al.,
Appellants,
v.
James B. Hunt, Jr., as Governor of the State of North Carolina, et al.,
Appellees.

On Appeal from a Three-Judge Panel of the United States District Court for the Eastern District of North Carolina

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS, RUTH O. SHAW, ET AL.

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Nos. 94-923, 94-924

In the Supreme Court of the United States
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Ruth O. Shaw, et al.,
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James Arthur Pope, et al.
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James B. Hunt, Jr., as Governor of the
State of North Carolina, et al.,
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On Appeal from a Three-Judge Panel of the United States District Court for the Eastern District of North Carolina

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS, RUTH O. SHAW, ET AL.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of appellants, Ruth O. Shaw, *et al.* All

parties have consented to the filing of this amicus brief. The letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Pacific Legal Foundation is submitting this brief because it believes its public policy perspective and litigation experience in the voting rights arena will provide an additional viewpoint with respect to the issues presented. PLF attorneys have participated in numerous other cases before this Court including *Hays v. Louisiana*, ___ U.S. ___, 63 U.S.L.W. 4679 (1995), *Adarand v. Pena*, ___ U.S. ___, 132 L. Ed. 2d 158 (1995), *Chisom v. Roemer*, 501 U.S. 380 (1991), and *League of United Latin American Citizens v. Attorney General of Texas*, 501 U.S. 419 (1991).

PLF believes that racial classifications by government, both in the voting rights context and otherwise, should be inherently suspect and, absent extraordinary circumstances, unconstitutional. This is particularly true when congressional districts are gerrymandered on the basis of race.

STATEMENT OF THE CASE

As a result of the 1990 census, North Carolina became entitled to a twelfth seat in the United States House of Representatives. North Carolina's General Assembly enacted a reapportionment plan that included one majority-black

congressional district. After the Attorney General of the United States objected to the plan pursuant to Section 5 of the Voting Rights Act,[1] the Assembly passed new legislation creating a second majority-black district. The resulting race-based configurations, Districts 1 and 12, lacked all inherent integrity, "instead merely patching together islands of voters with only a legislative intent to group predetermined numbers of voters by race." *Shaw v. Hunt*, 861 F. Supp. 408, 490 (E.D.N.C. 1994) (Voorhees, C.J., concurring in part and dissenting in part). "District 1 is somewhat hook shaped [and] ... has been compared to a 'Rorschach ink-blot test,' and a 'bug splattered on a windshield.'" *Shaw v. Reno*, 125 L. Ed. 2d at 521 (internal citations omitted). "District 12 is even more unusually shaped. It is approximately 160 miles long and, for much of its length, no wider than the I-85 corridor. It winds in snake-like fashion through tobacco country, financial centers, and manufacturing areas 'until it gobbles in enough enclaves of black neighborhoods.'" *Id.*

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[1] Forty of North Carolina's one hundred counties are covered by § 5 of the Voting Rights Act of 1965, 42 USC § 1973(c), which prohibits a jurisdiction subject to its provisions from implementing changes in a "standard, practice, or procedure with respect to voting" without federal authorization. ... The jurisdiction must obtain either a judgment from the United States District Court for the District of Columbia declaring that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or administrative preclearance from the Attorney General [of the United States].

Shaw v. Reno, ___ U.S. ___, 125 L. Ed. 2d 511, 520 (1993).

(internal citations omitted). The Attorney General did not object to this revised plan but appellants here, citizens and voters of North Carolina, sued in Federal District Court alleging that the state had created an unconstitutional racial gerrymander.

A three-judge District Court dismissed the complaint against both state and federal defendants. *Shaw v. Barr*, 808 F. Supp. 461 (E.D.N.C. 1992). The court rejected the argument that race-based districting is per se unconstitutional and that the reapportionment plan in question was impermissible. It reasoned that because the state's purpose was to comply with the Voting Rights Act, and the plan did not result in proportional underrepresentation of white voters state wide, the voters had failed to state a cognizable equal protection claim. *Id.* at 472-73.

This Court, in an opinion by Justice O'Connor, reversed the lower court's decision and remanded. *Shaw v. Reno,* 125 L. Ed. 2d 511. After setting out legal precedents on voting rights and the history of the Voting Rights Act, the Court noted that it was "unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past." *Id.* at 525. All governmental classifications by race are subject to strict scrutiny, regardless of the motive, including "legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race.'" *Id.* at 526-27 (internal citation omitted). And bizarre reapportionment plans, according to the Court, fall squarely within this strict scrutiny analysis. *Id.* at 529-30. All other issues or arguments were explicitly reserved and remained open for further consideration. *Id.* at 530, 534-35.

On remand, a majority of the three-judge District Court found that the North Carolina redistricting plan intentionally segregated black citizens into the First and Twelfth Districts, requiring strict scrutiny of the racial gerrymander. *Hunt,* 861 F. Supp. at 473-74. The court, however, found that the

plan served a "compelling interest" by racial gerrymandering --the State "had a 'strong basis in evidence' for concluding that such action was necessary to bring its existing congressional redistricting scheme into compliance with §§ 2 and 5 of the Voting Rights Act."[2] *Id.* at 474. Pursuant to this allegedly compelling interest, the court held that the racial gerrymander was "narrowly tailored" to serve that compelling interest. *Id.* at 475.

In a thoughtful and persuasive separate opinion, Chief Judge Richard L. Voorhees questioned the majority's argument that the plan was (1) narrowly tailored to further (2) a compelling interest. *Id.* at 476-97 (Voorhees, C.J., concurring in part and dissenting in part). Not only had the court been overly selective in choosing operative facts and crabbed in its interpretation of the Supreme Court's opinion in *Shaw v. Reno*, but its "feverish concluding characterization

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[2] "Section 2 of the Voting Rights Act of 1965 provides that '[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.' 42 U.S.C. § 1973(a)." *Holder v. Hall,* 512 U.S. ___, 129 L. Ed. 2d 687, 694 (1994). In a Section 2 vote dilution suit, a court must first determine that (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district, (2) the minority group is cohesive, and (3) the majority group votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. *Id.* at 695 n.1. Second, the court must determine "whether the totality of the circumstances supports a finding of liability." *Id.* at 695. Finally, "a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice." *Id.* at 695.

of the case" could raise the specter of judicial partiality. *Id.* at 479 n.7.

Ruth O. Shaw, *et al.*, appealed the District Court's decisions. This Court consolidated the appeals and noted probable jurisdiction on June 29, 1995.

SUMMARY OF ARGUMENT

First, the Voting Rights Act unconstitutionally requires racially proportional representation in redistricting. The Act originally was aimed only at discriminatory voting procedures which denied blacks the right to cast their ballots. Although the 1982 amendments to the Act included those procedures which had racially discriminatory "results" (but not necessarily "intent") it explicitly repudiated proportional representation by race. However, the executive and legislative branches of the federal and state governments have interpreted Supreme Court opinions interpreting the Act to require proportional representation. Thus, this Court must clarify its construction of the Act so that other branches of government will not be led to apply the statute and case law in an unconstitutional manner.

Given that proportional representation is unconstitutional and fundamentally opposed to American principles of democratic government, if the Act cannot be interpreted in any way other than to require such proportional representation, the Act itself must be struck down as unconstitutional. Alternatively, legislative and executive actions outside the scope of the Act which require proportional representation must be invalidated as unconstitutional. Mandated proportional representation is equivalent to the strict racial quota systems found by this Court to be abhorrent to the Constitution. It segregates individuals into racial clans, inhibiting the democratic tenets of coalition and compromise. It fosters politicians who represent races rather than

constituents. It prevents broad-based minority power by limiting their influence to a few "majority-minority" districts. And it makes the patently false and pernicious assumption that all minorities think alike and that only a minority can properly represent minority interests.

Second, the Fourteenth Amendment forbids government institutions from redistricting based on race. Historically, American political thought emphasized equality of opportunity, "moral equality," over equality of results, "numerical equality." From the Civil War through the Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), and the enactment of the landmark civil rights legislation in the 1960s, both government and citizen activists agreed that moral equality was the basis for a strong, nondiscriminatory republic. For the past 25 years, however, numerical equality superseded moral equality as the foundation for governmental decision making. This ascendance of numerical equality is contrary to the premises on which America achieved its distinctive greatness.

Allowing states to racially gerrymander revives the invidious doctrine of "separate but equal," fosters separatist beliefs and actions, and renounces the "moral equality" on which our Nation is based. It is per se unconstitutional under the Fourteenth and Fifteenth Amendments and the principles espoused by *Brown* and its progeny. It is tantamount to the immoral and indefensible caste and apartheid systems which have been universally denounced. And there is no legal justification, no compelling interest, for segregating individuals into "racial boroughs."

For the reasons stated below, the Eastern District of North Carolina's decision below should be reversed.

ARGUMENT

I

THE VOTING RIGHTS ACT UNCONSTITUTIONALLY REQUIRES RACIALLY PROPORTIONAL REPRESENTATION IN REDISTRICTING

In 1964, Dr. Martin Luther King proclaimed that "[o]nly with the growth of an enlightened electorate, white and Negro together, can we put a quick end to this century-old stranglehold of a [racist] minority on the nation's legislative processes." M. King, *Why We Can't Wait* 149-50 (1964). Dr. King's words became legislative action less than a year later with the passage of the Voting Rights Act. "The vote is the most powerful instrument ever devised by man for breaking down injustice and destroying the terrible walls which imprison men because they are different from other men," proclaimed President Lyndon Johnson upon signing the Act into law. S. Lawson, *In Pursuit of Power: Southern Blacks and Electoral Politics* 3-4 (1985).

A. Original Intent of the Voting Rights Act

As stated in its preamble, the Act was intended "[t]o enforce the fifteenth amendment to the Constitution of the United States." *See Allen v. State Board of Elections,* 393 U.S. 544, 588 (1969) (Harlan, J., concurring in part and dissenting in part). Section 2 of the Act was largely uncontroversial and was seen only as a restatement of this Civil War Amendment. *Chisom*, 501 U.S. at 392; *City of Mobile v. Bolden,* 446 U.S. 55, 60-62 (1980). Pursuant to this constitutional power, the statute was aimed at discriminatory voting procedures which continued to deprive blacks of access to the ballot, such as literacy tests and "grandfather clauses." *Holder v. Hall,* 129 L. Ed. 2d at 703 (Thomas, J., concurring in the judgment). Then Attorney

General Katzenbach repeatedly emphasized that the sole ambition of the Act was getting people registered. *United States v. Board of Commissioners of Sheffield,* 435 U.S. 110, 145 (1978) (Powell, J., concurring in part and concurring in the judgment). Although the Act constituted an "uncommon exercise of congressional power," *South Carolina v. Katzenbach,* 383 U.S. 301, 334 (1966), and a "substantial departure ... from ordinary concepts of our federal system," *Hearings on S. 407, et al., Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 94th Cong., 1st Sess. 536 (1975) (testimony of J. Stanley Pottinger), its *limited* scope made it proper legislation pursuant to the Fifteenth Amendment. *See, e.g., City of Mobile*, 446 U.S. at 60-61. Three decades later, "the gradual workings of the original law" have been remarkably successful in meeting its goals: "the enrollment of minority voters, the large-scale entry of minority voters into the rank and file of the political parties, the entry of minority candidates into politics, and a growing receptiveness of a predominantly white electorate to minority candidates." T. O'Rourke, *The Voting Rights Paradox* in *Controversies in Minority Voting* 109 (Grofman & Davidson, eds., 1992) (Paradox); *see also Holder,* 129 L. Ed. 2d at 704 (Thomas, J., concurring in the judgment).

The Act, however, did not and could not reach vote "dilution" and, in particular, racial gerrymandering claims. *Holder,* 129 L. Ed. 2d at 716 (Thomas, J., concurring in the judgment). Drawing district lines must be distinguished from the basic process of allowing a citizen to vote: registering, casting a ballot, and having it counted. *Id.* at 717. This dichotomy reflects the different bases of the different types of claims. As noted, the Act derived from the Fifteenth Amendment, while gerrymandering claims are cognizable only under the Fourteenth Amendment. *See Voinovich v. Quilter,* 507 U.S. ___, 122 L. Ed. 2d 500, 514 (1993); *City of Rome v. United States,* 446 U.S. 156, 207 n.1 (1980)

(Powell, J., dissenting); *Beer v. United States*, 425 U.S. 130, 142-43 n.14 (1976).

Furthermore, the Act, in its original and amended form, did not call for proportional racial representation. In fact, it explicitly disavowed any such intent: "[N]othing in this section established a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b). Members of this Court have recognized this prohibition both before and after the 1982 amendments to the Act. *See, e.g., City of Mobile,* 446 U.S. at 65 (opinion of Justice Potter Stewart for the Court); *Holder,* 129 L. Ed. 2d at 724 (Thomas, J., concurring in the judgment). According to Senator Bob Dole, the key framer in the 1982 amendments, the Act would "[a]bsolutely not" provide any remedy for groups of disgruntled voters if each *individual* was allowed to exercise his franchise. 128 Cong. Rec. 14,133 (1982). Dole viewed the Act as "focused on *access* to the processes surrounding the casting of a ballot, not ... ensuring electoral *outcomes* in accordance with some 'undiluted' norm." *Holder,* 129 L. Ed. 2d at 728 (citing S. Rep. No. 97-417 193-94 (1982)). The Act simply was not intended or expected to create proportional representation by race.

B. Executive and Legislative Branches of Government Have Interpreted and Appled the Act to Require Unconstitutional Racial Representation

The current interpretation of the Voting Rights Act by the Department of Justice and state legislatures, in direct contravention of its legislative language and Supreme Court precedents now calls for proportional racial representation. How did this occur?

> It is a story of amendment through inadvertence, of minor tinkering with large consequences; of change precipitating change; of a skilled civil rights lobby working in a hospitable environment

> and blessed with both an opposition prone to self-inflicted wounds and extraordinary access to the chairman of a House subcommittee; of the slapdash, inattentive habits of Congress; of contradictory Supreme Court decisions; of a D.C. district court with a revisionist vision of the act, consistently asserting the right of racial and ethnic minorities to proportional representation; of the frequent application of a standard close to proportionality in the interpretation of section 2 [of the Act] as well; and of Department of Justice attorneys who invent law as they enforce it.

A. Thernstrom, *Whose Votes Count?* 235-36 (Harvard University Press, 1987) (Thernstrom). Each of these factors has led to the distortion and incoherence of the Act.

First, no fewer than six justices of this Court have recognized that the current interpretation of the Act creates proportional representation. In *Thornburg v. Gingles,* 478 U.S. 30, 97 (1986), Justice O'Connor, joined by Chief Justice Burger, and Justices Rehnquist and Powell stated that through its interpretation, "the Court is requiring a form of proportional representation." *See id.* at 85, 91. In *Holder,* Justice Thomas and Justice Scalia agreed that the Act as interpreted and applied requires proportional racial representation. 129 L. Ed. 2d at 706-09 (Thomas, J., concurring in the judgment). Whether expressly stated by present and former members of the Court or "hidden" within the morass labeled "totality of the circumstances," *see* Thernstrom at 127, the Act as interpreted mandates racial proportionality in elections.

Second, experts and legislators at the time of the 1982 amendments to the Voting Rights Act believed that racial proportionality would result. According to Duke Law Professor Donald Horowitz, "[t]he only way to judge the effect [of a redistricting scheme] will be to see whether

minority voters have representatives in proportion to their population in that jurisdiction." *Hearings on S. 53, et al., Bills to Amend the Voting Rights Act of 1965, Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary,* 97th Cong., 2d Sess. 1309 (1982) (Senate Hearings); *see also id.* at 1340 (testimony of Professor James Blumstein). Some congressional witnesses were less methodical in their approach but came to the same conclusion: "South Carolina's population is approximately 30 percent black, and 30 percent of the senate should be black," argued Dr. Willie Gibson, president of the NAACP Conference for South Carolina. *Id.* at 252; *see also id.* at 253 (statement of Jesse Jackson).

Third, the Department of Justice has independently determined that the Act requires proportional representation. For example, a Justice Department memorandum on Barbour County, Alabama, candidly argued that "[s]ince blacks constitute 40.5 percent of the voting age population, they would be entitled to 2.8 districts, that is two viable districts plus a third district in which their interests must be taken into account even though they cannot control the election." Thernstrom at 171-72, *see also id.* at 179. This Court recently concluded in *Miller v. Johnson,* ___ U.S. ___, 63 U.S.L.W. 4726, 4728 (June 27, 1995), that the plan adopted by the Georgia state legislature "bore all the signs of [the Justice Department's] involvement," gouging out black populations and connecting them "by the narrowest of land bridges." (Internal citations omitted). The Justice Department demanded race-based revisions to Georgia's redistricting plans, and the state legislature eventually acquiesced. *Id.* at 4731. This Court affirmed the District Court's invalidation of the plan, concluding that "the Justice Department's implicit command [was] that States engage in presumptively unconstitutional race-based districting." *Id.* at 4733. Similarly, here, the interaction between North Carolina legislators and the Department of Justice took

the form of federal commands rather than enlightened discussion.

> [Assistant United States Attorney General for Civil Rights John] Dunne did most of the talking ... and most of it got down to ... a quota system with respect to minority seats. You had 22 percent blacks in this state. Therefore you ought to have as close to that as you could have [in] congressional districts. ... [I]f you had 22 percent blacks in North Carolina, then you ought to have 22 percent minority congressional seats. Whatever shape didn't matter.

Hunt, 861 F. Supp. at 484 n.16 (Voorhees, C.J., concurring in part and dissenting in part).

It is no wonder that states seeking to avoid harassment and threats from the Department of Justice have begun to gerrymander electoral districts according to race. *See Holder*, 129 L. Ed. 2d at 710 (Thomas, J., concurring). The result is that the states, the lower courts (*see, e.g.*, *Barnett*, 808 F. Supp. at 472-73; *United States v. Dallas County Commission*, 850 F.2d 1433, 1437-42 (11th Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989)), and the Department of Justice are all converging on the standard that the Act explicitly refuted—racial proportionality in elected representatives. Justice Kennedy, concurring in *Johnson v. DeGrandy*, 512 U.S. ___, 129 L. Ed. 2d 775, 800 (1994) (Kennedy, J., concurring in part and concurring in the judgment), hypothesized the potential results:

> States might consider it lawful and proper to act with the explicit goal of creating a proportional number of majority-minority districts in an effort to avoid § 2 [of the Act] litigation. Likewise, a court finding a § 2 violation might believe that the only appropriate remedy is to order the offending State to engage in race-based

> redistricting and create a minimum number of districts in which minorities constitute a voting majority. The Department of Justice might require (in effect) the same as a condition of granting preclearance, under § 5 of the Act, ... to a State's proposed legislative redistricting.

This possible use and abuse of racial proportionality in redistricting, however, is not hypothetical--it is reality. *See, e.g.*, Thernstrom at 193. The current interpretation and application of the Act, whether by courts, the Department of Justice, or state legislators, is that redistricting must create racial proportionality. This interpretation is unconstitutional.

C. Required Racial Proportionality Is Unconstitutional and Fundamentally Opposed to American Principles of Government

A construction of the Voting Rights Act, which requires racial proportionality in redistricting, is unconstitutional and fundamentally opposed to American principles of democratic government. It is no different than the strict quota systems in governmental hiring and contracting. *See, e.g., Northeastern Florida Contractors v. City of Jacksonville*, ___ U.S. ___, 124 L. Ed. 2d 586, 594-95 (1993) (a strict quota system under a different label is still a quota system); *Regents of University of California v. Bakke*, 438 U.S. 265, 288-89 (1978) (same). Minorities make up X percent of the population, therefore they should have a quota of X percent of the elected representatives--or so the theory goes. Strict racial quotas, however, have been found by this Court to be abhorrent to the Constitution. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499-508 (1989); *Bakke*, 438 U.S. at 307-11, 315-19; *see also* A. Bickel, *The Morality of Consent* 133 (Yale University Press, 1975). In its effects, however, the racial quota epitomized in proportional redistricting is even more invidious and destructive

of American democracy than strict employment and contracting quotas.

"Rotten boroughs were long a curse of democratic processes. Racial boroughs are also at war with democratic standards." *Wright v. Rockefeller*, 376 U.S. 52, 62 (1964) (Douglas, J., dissenting). "[D]emocratic choice and democratic institutions require a fluidity and freedom that are at odds with the concept of labeling citizens for political purposes on the basis of race or ethnicity." Thernstrom at 124.

There are four reasons why racial proportionality in voting districts violates the United States Constitution. First, racially proportional redistricting "is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense." *Wright*, 376 U.S. at 66 (Douglas, J., dissenting).

> When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than political issues are generated; communities seek not the best representative but the best racial or religious partisan. ... [T]hat system is at war with the democratic ideal."

Id. at 67. "Racially defined wards" accentuating "race-based allegiances and divisions," Senate Hearings at 1449 (statement of Professor William Van Alstyne), obviate the need to form coalitions and seek compromise--two of the most heralded features of American government. "Safe minority districts," like the white gerrymandered districts of the past, obstruct voters or candidates from building bridges between racial groups and from forming voting coalitions that transcend skin color. *Holder*, 129 L. Ed. 2d at 711-12 (Thomas, J., concurring). The Voting Rights Act, "a statute

meant to hasten the waning of racism in American politics," *DeGrandy,* 129 L. Ed. 2d at 796, thus becomes a tool of division rather than integration.

Second, a necessary corollary of this racial divisiveness is ambivalence by white politicians toward minority citizens and minority politicians toward white citizens. It is "unnecessary, and probably unwise, for an elected official from a white majority district to be responsive at all to the wishes of black citizens; similarly, it is politically unwise for a black official from a black majority district to be responsive at all to white citizens." *Dallas County Commission,* 850 F. 2d at 1444 (Hill, J., concurring). "[A]ssured minority representation encourages local white politicians to say to the minority communities: 'You have your own representatives. Don't come to us with your problems; speak to them.'" Senate Hearings at 1327-28 (testimony of Professor Horowitz). *See also Shaw,* 125 L. Ed. 2d at 529.

Third, a state-imposed racial gerrymander assumes that, given a choice, black voters would not choose to exercise broader influence over a number of competitive districts. One of the obvious effects of creating and maintaining safe black seats is to isolate the black community, as well as to diminish electoral competition. Where black voters are confined to a single constituency, they might well be certain of electing *one* black candidate, but the elected representative might also be the only one--or a member of a small, heavily outnumbered and, consequently, ineffective band. Meanwhile, the black electorate suffers a diminished capacity to influence white representatives who might have taken their concerns into account if they themselves had needed to rely on black votes. J. R. Pole, *The Pursuit of Equality in American History* 449-50 (2d ed. revised, University of California Press, Berkeley, 1993) (Pole); D. Bell, *And We*

Are Not Saved: The Elusive Quest for Racial Justice 96 (Basic Books, Inc., N.Y., 1987).

"'I am bitterly opposed to any effort to resegregate me ...,' a black judge in Norfolk, Virginia, testified at a voting rights trial. 'How does it help the black community to limit itself to two predominantly black wards and be of no consequence in the remainder of the community? Political power is not merely symbolic.'" Thernstrom at 244. Without the divisive force of racial reapportionment, politicians have been forced to weld together multiracial coalitions. Democrats and Republicans, of all races, regularly owe their election to minority support. Even separatists of the past, such as Dixiecrat politicians Strom Thurmond and George Wallace, have sought minority support out of political necessity and thus have been forced to address the concerns of *all* constituents, regardless of race. *Id.* at 234, 241. Such coalitions exemplify the American political tradition.

Finally, and most importantly, racial redistricting makes the patently false and pernicious assumption that all minorities think alike and that only a member of a given minority can properly represent minority interests. The Court has held that racial gerrymandering "reinforces the perception that members of the same racial group--regardless of their age, education, economic status, or the community in which they live--think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw,* 125 L. Ed. 2d at 529. In fact, "[b]y perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract." *Id.* Recently, Justice Thomas reiterated and expanded on these sentiments: "The clear premise of the system is that geographic districts are merely a device to be manipulated to establish 'black representatives' whose real constituencies are defined, not in terms of the voters who populate their districts, but in terms

of race. The 'black representative's' function, in other words, is to represent the 'black interest.'" *Holder*, 129 L. Ed. 2d at 712 (Thomas, J., concurring).

Thus, the current interpretation of the Voting Rights Act unconstitutionally requires the creation of racially proportional legislative districts. Originally, the intent of the Act was to ensure nondiscriminatory access to the ballot, *i.e.*, prohibiting literacy tests and other discriminatory prerequisites for voting. *See Allen v. State Board of Elections*, 393 U.S. at 582-94 (Harlan, J., dissenting). As such, it was a valid exercise of the Fifteenth Amendment's remedial powers and was "constitutionally valid as interpreted and as applied." *Shaw*, 125 L. Ed. 2d at 533. But "Congress' exercise of its Fifteenth Amendment authority even when otherwise proper still must 'consist with the letter and spirit of the constitution.'" *Miller*, 63 U.S.L.W. at 4733 (internal citation omitted). The Voting Rights Act is not an all-purpose weapon to be used by social engineers in the pursuit of their concept of utopia. *See Presley v. Etowah County Commission*, 502 U.S. 491, 509 (1992); *Chisom*, 501 U.S. at 404 (Scalia, J., dissenting). The Voting Rights Act is, always has been, and always will be a statute that must square with the dictates of the Constitution. Because the executive and legislative branches of the federal and state governments interpret and apply the Act and case law involving the Act so as to require the creation of racially proportional districts, this Court must reevaluate the Act to assure either an interpretation which does not violate the Constitution or to invalidate the Act itself, if it cannot be construed to avoid unconstitutional applications.

II

RACIAL GERRYMANDERING IS NEVER CONSTITUTIONAL

Whatever may be the justification for racial classifications in other situations (*e.g.*, "affirmative action" in contracting and employment), the Fourteenth Amendment forbids government institutions from redistricting based on race and ethnicity. To put it in the familiar nomenclature of the Court, racial gerrymandering can never survive strict scrutiny because there is no compelling justification for redistricting on racial lines.

The Fourteenth Amendment to our Constitution embodies the fundamental principle of "moral equality." Moral equality requires that government and society consider every person as an individual, not as a fungible member of some racial or ethnic group. Moral equality forbids government from handicapping individuals for arbitrary or discriminatory reasons. It has been alternatively described as "equality of opportunity," especially when contrasted with numerical equality, or "equality of results." T. Eastland and W. Bennett, *Counting by Race: Equality from the Founding Fathers to Bakke and Weber* 9-10 (Basic Books, Inc., N.Y., 1979) (Eastland); *see also* T. Sowell, *A Conflict of Visions: Ideological Origins of Political Struggles* 121-40 (William Morrow & Co., N.Y., 1987).

America was founded on the basis of moral equality, as it is so eloquently phrased in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness." The institution of slavery existed at the time of the Declaration and was hopelessly inconsistent with it. For nearly a century, this incompatibility provoked bitter political debate, culminating with Abraham Lincoln declaring an end to slavery in 1863

and the triumph of the Union in 1865. The Fourteenth Amendment enshrined the victorious concept of moral equality after the Civil War and this concept was still the norm through the enactment of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Only within the last 25 years has devotion to numerical equality threatened to subsume moral equality as the basis for American politics.

A. Historical Basis for Moral Equality

Moral equality was central to the philosophical principles which inspired the founding of the American republic. In John Locke's Second Treatise, the philosopher argued that "all men are naturally in ... a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave or depending upon the will of any other man." J. Locke, *Two Treatises of Government* 121 (T. Cook ed., 1947), *cited in* H. Jaffa, *How to Think About the American Revolution: A Bicentennial Celebration* 40 (Durham, N.C., 1978) (Jaffa). This concept of natural freedom and equality provided that the just powers of government in the American political tradition could only be derived from the consent of the governed. Because the right of consent is itself derived from the equality of all humans, consent is limited--one may not consent to that which denies the premise of equality. Jaffa at 40-42; *see also The Federalist No. 51* (J. Madison) (Rossiter ed., 1961) at 322. A government of men over men, rather than of angels over men, or of men over beasts, presumes the moral equality of the men who govern, not only among themselves but also with the governed. Thus, the very nature of the problem that the Constitution was written to resolve is determined by the meaning of equality. Jaffa at 42.

British political scientist Joel Barlow wrote in 1792 that the American notion of moral equality precipitated the Revolution and sustained American freedom. In the United

States, the word "people" meant the whole community and comprehended every human being in the society. There were only "individuals" in America; there could be nothing else--no feudal system, no lords, no monarchs. Rather, Americans revered only those distinctions which nature created--a diversity of talents, abilities, and virtues. J. Barlow, *Advice to the Privileged Orders in the Several States of Europe Resulting from the Necessity and Propriety of a General Revolution in the Principles of Government* 17 (Ithaca, N.Y., 1956, first published London, 1792), *cited in* G. Wood, *Creation of the American Republic, 1776-1789* 607 (University of North Carolina Press, 1969). The obvious conflict between moral equality and the institution of slavery was not fully resolved in American political and legal thought until Abraham Lincoln freed all slaves with the Emancipation Proclamation on January 1, 1863, *reprinted in* H. Commager, *Documents of American History*, Vol. 1, 420-21 (9th ed. 1973) (Commager), and the states ratified the Thirteenth Amendment to the United States Constitution on December 6, 1865.

Lincoln's importance to the development of the concept of moral equality cannot be underestimated. To him, the principle of equality was logically necessary to the idea of self-government. *Lincoln's First Inaugural Address* (March 4, 1861), *reprinted in* Commager at 386-88. Self-government, by definition, requires the assumption that all humans possess free will and that all are morally autonomous. In this sense, all individuals are created equal and for one person to deal with another, because of race, in ways that deny or diminish the other's intrinsic worth as a moral agent is to deny the very basis upon which self-government is possible. Eastland at 55-56.

In his message to Congress on July 4, 1861, Lincoln defined the cause of the Union as the preservation of "that form, and substance of government, whose leading object is, to elevate men--to lift artificial weights from all shoulders--to

clear the paths of laudable pursuit for all--to afford all, an unfettered start, and a fair chance, in the race of life." 4 *The Collected Works of Abraham Lincoln* 438 (R. Basler ed., 1953), *cited in* Jaffa at 34. Thus, republican government, in Lincoln's view, necessitated the elimination of slavery because it was incompatible with the principle of moral equality. Lincoln believed that this principle was higher than any other: It defined republican government. Eastland at 47.

The passage of the Civil War Amendments in 1865-1870 highlighted the primacy of moral equality. These Amendments spoke only of individuals, not groups: "[E]quality is an individual attribute that had no connection with class or race; the [Fourteenth] [A]mendment extended the same rights to all--there could be no need to mention race or colour. ... Equality could not be divided into sections as happened to suit the demands of one or another class or interest group at any particular time." Pole at 180-81. This moral equality of the individual, espoused by President Lincoln, led to the judicial concept of a color-blind Constitution:

> [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Sadly, the moral equality and constitutional

protection of the individual under a color-blind Constitution was corrupted by the doctrine of "separate but equal," an invidious concept that haunted America for more than a half-century.

On May 17, 1954, the Court once and for all declared "that all men are created equal," and that our Constitution would stand for nothing less. "Separate" is "inherently unequal." *Brown v. Board of Education*, 347 U.S. at 495. The Court's opinion would provide the legal foundation for Dr. Martin Luther King's "dream"--that his children would "live in a nation where they will not be judged by the color of their skin but by the content of their character." A. Kull, *A Color Blind Constitution* 166 (Harvard University Press, 1992). Moral equality, fundamental democratic principles, and the Constitution were restored as the supreme law of the land.

How, then, have states been not only allowed but *required* to segregate congressional districts? Some general observations can be accurately made: The pursuit of numerical, rather than moral, equality unfortunately has been embraced by virtually all institutions of government and some public opinion. *See* Bickel at 133. The most disturbing aspect of this shift in political thought is the disavowal of individual rights in favor of a collective group rights concept of equality. All blacks are held to be victims of discrimination and hence entitled to compensation. All whites are held to have benefited unjustly from the system of racial discrimination and are guilty. These assumptions stand in fundamental opposition to the universal principle of individual rights that has been the moral and intellectual foundation of the American republic. *See* H. Belz, *Equal Protection and Affirmative Action, The Bill of Rights in Modern America* 173 (Bodenhamer & Ely, eds., Indiana University Press, 1993) (Belz).

B. Racial Gerrymandering Violates Brown and the Concept of Moral Equality

By allowing states to racially gerrymander their electoral districts, the despicable doctrine of "separate but equal," under the guise of "separate but better off," *Wright*, 376 U.S. at 62 (Douglas, J., dissenting), or "separate but proportional," Belz at 162, is restored under the sanction of law. In 1964, Justice Douglas asserted that there could be no legal distinction between segregation in voting and segregation elsewhere.

> I had assumed that since *Brown v. Board of Education* ... no State may segregate people by race *in the public areas*. The design of voting districts involves one important *public area*--as important as schools, parks, and courtrooms. We should uproot all vestiges of *Plessy v. Ferguson* ... from *the public area*. ... "Separate but equal" and "separate but better off" have no more place in voting districts than they have in schools, parks, railroad terminals, or any other facility serving the public.

Wright, 376 U.S. at 62, 67 (1964) (Douglas, J., dissenting) (internal citations omitted); *see also Miller*, 63 U.S.L.W. at 4729. The late Professor Bickel believed that *Brown* and its progeny foreclosed official racial segregation and discrimination, for now and forever: "The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." Bickel at 133. To allow states to be anything but race-neutral in the drawing of electoral districts is to deny moral equality and repudiate *Brown*.

First, racial segregation in redistricting is a per se violation of the Fourteenth and Fifteenth Amendments to the

Constitution. The Fifteenth Amendment is an "exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude." *United States v. Reese*, 92 U.S. 214, 217-18 (1876). There are no codicils or clauses in this Amendment with respect to a particular race--it is wholly color-blind and forbids *all* discrimination in voting, not merely discrimination that social engineers anoint as "invidious." Similarly, the Fourteenth Amendment forbids racial discrimination in regards to democratic elections: "Its central mandate is racial neutrality in governmental decisionmaking." *Miller*, 63 U.S.L.W. at 4727. In *Wright*, Justice Goldberg faithfully united the moral equality of *Brown*, the Fourteenth Amendment, and the harm of racial gerrymandering: "Given this settled principle that state-sanctioned racial segregation is unconstitutional per se," he wrote, "the Court's decisions since Brown v Board of Education [have held] that harm to the Nation as a whole and to whites and Negroes alike inheres in segregation. The Fourteenth Amendment commands equality, and racial segregation by law is inequality." *Wright*, 376 U.S. at 69 (Goldberg, J., dissenting). Although racial discrimination unrelated to elections (*i.e.*, "affirmative action") has been allowed by this Court to stand in the past, "[o]ur Constitution has a special thrust when it comes to voting," as emphasized by the Fifteenth Amendment. *Whitcomb v. Chavis*, 403 U.S. 124, 180 (1971) (Douglas, J., dissenting in part and concurring in part). Racial gerrymandering cannot be justified in light of the dictates of the Fourteenth and Fifteenth Amendments and the moral equality of *Brown*.

Second, segregating individuals by skin color into racial districts is tantamount to the despicable institution of apartheid in South Africa and the caste system of India: "A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who

may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." *Shaw,* 125 L. Ed. 2d at 529; *see also Holder,* 129 L. Ed. 2d at 710-11 (Thomas, J., concurring in the judgment). The analogy to apartheid and caste systems is not novel: Three decades ago Justice Douglas argued that redistricting by racial segregation "is comparable to the Electoral Register System which Britain introduced into India." *Wright,* 376 U.S. at 63 (Douglas, J., dissenting). In that political caste system, "[n]o one who is not a Sikh, a Muhammadan, Anglo Indian, European or an Indian Christian, is entitled to be included in a Sikh, Muhammadan, Anglo Indian, European or an Indian Christian constituency respectively." *Id.* at 63 n.5. This system was allegedly justifiable because, *inter alia*, "Muslims are a distinct community with additional interests of their own, which are not shared by other communities." *Id.* at 63. This sounds remarkably similar to the current justification for racial gerrymandering in America. A caste system might allow racial clans to be organized into a tribal federation, but it can never result in an indivisible nation of independent and free-thinking men and women. Thernstrom at 132.

But "[t]here is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy,* 163 U.S. at 559 (Harlan, J., dissenting). By permitting racial segregation in redistricting, we "reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American." *Adarand Constructors, Inc. v. Pena,* 132 L. Ed. 2d at 190 (Scalia, J., concurring in part and concurring in the judgment); *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 187 (1977) (Burger, C.J., dissenting) (noting the retreat from the ideal of the American "melting pot"). Further, the cost of allowing political apartheid in

our system of representative government is not academic or idle:

> There is much reason to fear the harm that it is currently doing to its supposed beneficiaries, and still more reason to fear the long-run consequences of polarizing the nation. Resentments do not accumulate indefinitely without consequences. Already there are signs of hate organizations growing in parts of the country and among more educated social classes than ever took them seriously before. As a distinguished writer has said in a different context: "It takes a match to start a fire but the match alone is not enough." Many racial policies continually add to the pile of combustible material, which only needs the right political arsonist to set it off.

T. Sowell, *Civil Rights: Rhetoric or Reality?* 117-18 (1984) (Sowell) (emphasis omitted). In light of the "ethnic cleansing" occurring in Bosnia, Rwanda, and elsewhere, and America's own tragic history of race hate, race subjugation, and race slavery, the Court should be particularly wary of acquiescing to separatist policies and disregarding the tragic potential of political segregation by saying "it could never happen here."

Finally, there is no legal justification for racial segregation in redistricting, i.e., there is no compelling state interest that would allow this racial classification to survive strict scrutiny. The only possible remedy when a governmental entity racially gerrymanders is to replace it with a race-neutral districting scheme. *United Jewish Organizations,* 430 U.S. at 186 (Burger, C.J., dissenting) (internal citation omitted). Only one governmental interest can maintain racial classifications under strict scrutiny: remedying the present effects of identified past illegal discrimination by a particular government entity. *See*

Wygant v. Jackson Board of Education, 476 U.S. 267, 274 (1986); *Richmond v. J.A. Croson Co.*, 488 U.S. at 524 (Scalia, J., concurring in the judgment); *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting) This "remedy rationale" might be appropriate in the context of governmental hiring and contracting: A minority *individual* may have been denied the opportunity to compete for government employment or contracts because of his or her race and, by giving that *individual* a preference in the hiring/contracting process, an employer compensates that *individual* for a past opportunity denied.

This rationale, however, cannot square with the conditions of voting and redistricting. There are no residual losses from "bad" elections and redistricting schemes of the past: Each time a governmental entity redistricts its jurisdiction, the slate is cleaned. The fact that a previous group of legislators invidiously gerrymandered by race after a previous census has absolutely nothing to do with the present redistricting process--either the new plan is race-neutral and must be deferred to, or it segregates individuals by race and must be struck down as unconstitutional. There simply is no grey area in redistricting. By creating "majority-minority districts," or "minority influence districts," or any other form of "racial borough," "[n]o old injustice is undone, but a new injustice is inflicted." R. Bork, *The Tempting of America* 106 (The Free Press, 1990); *see also* Sowell at 119. The only constitutional response to racial gerrymandering is to strike it down emphatically and require race-neutral redistricting in its place.

"[G]overnment has no business designing electoral districts along racial or religious lines." *Wright*, 376 U.S. at 66 (Douglas, J., dissenting). Racial gerrymandering, whether "benign" or "invidious," "threatens to carry us further from the goal of a political system in which race no

longer matters--a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Shaw*, 125 L. Ed. 2d at 535. This Court should strike down the racial gerrymandering scheme at issue in this case and establish that, in the context of legislative redistricting, our Constitution is truly color-blind.

CONCLUSION

"The destinies of the two races in this country are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law." *Plessy*, 163 U.S. at 560-61 (Harlan, J., dissenting). Justice Harlan's words, founded on the Fourteenth Amendment and given legal credence by *Brown v. Board of Education*, required the end of segregation in buses, in schools, and in districting. The Court should uphold the legacy of truth in Justice Harlan's dissent and the moral equality which forms the basis for the American political tradition by reversing the decision of the court below.

DATED: August, 1995.

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Supreme Court of the United States

October Term 1995

RUTH O. SHAW, *et al.*,

Appellants,

v.

JAMES B. HUNT, JR., *et al.*,

Appellees.

JAMES ARTHUR POPE, *et al.*,

Appellants,

v.

JAMES B. HUNT, JR., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF OF THE CONGRESSIONAL BLACK CAUCUS AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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INTERESTS OF AMICUS CURIAE

The Congressional Black Caucus (the "Caucus") is composed of 40 African Americans who have been elected to the United States House of Representatives and Senate. Thirty-six of the 40 members were elected from majority-minority districts. The determination regarding the constitutionality of North Carolina's redistricting legislation is one that will affect not only the two Caucus members from North Carolina, but also other Caucus members and millions of African Americans who reside in majority-minority districts.

ARGUMENT

I.

SUMMARY OF ARGUMENT

The Caucus believes that majority-minority districts are an indispensable means of advancing America from a political tradition of exclusion based on race, to a political future of full inclusion. The general purpose of all districting is to permit the representation of numerical minorities whose votes otherwise would be submerged by those of the majority. In the context of racial minorities, majority-minority districts operate to ensure that their votes are not consistently submerged.

Majority-minority districts also further the pluralist aspirations of our American democracy. These districts have enabled racial minorities, for the first time in some instances, to elect the candidates of their choice. This increased diversity within Congress legitimizes congressional discourse and legislation.

This Court's decisions in *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993) and *Miller* v. *Johnson*, 115 S. Ct. 2475 (1995), articulate the standard of review for race-conscious districting. Although redistricting decisions always have included consideration of racial demographics, this Court has decided that where race is the "predominant" factor motivating redistricting legislation that legislation should be evaluated under the most exacting standard of constitutional review. *See Miller*, 115 S. Ct. at 2482-83; *Shaw*, 113

S. Ct. at 2824. This Court further notes that a redistricting plan is *not* narrowly tailored if it goes "beyond what is reasonably necessary" to further a compelling interest. *See Shaw*, 113 S. Ct. at 2831. The Caucus maintains that the North Carolina redistricting legislation was narrowly tailored to serve the state's compelling interest in remedying the effects of North Carolina's history of racial discrimination and political exclusion.[1]

The State of North Carolina has a long, ugly history of racial discrimination and political exclusion. In the context of congressional elections, prior to the challenged 1992 redistricting legislation, African Americans in North Carolina had essentially been shut out of the political process for almost one hundred years. North Carolina used a variety of *de jure* methods--*e.g.*, literacy tests and poll taxes—to prevent African Americans from electing the candidates of their choice. In addition, *within the last ten years*, political parties and candidates in North Carolina have engaged in fraudulent schemes to intimidate African-American voters and have used race-baiting campaign tactics. As set forth below, North Carolina had a compelling governmental interest in enacting districting legislation that remedies the substantial effects of its past racist policies and present practices.

Moreover, race-conscious districting has not resulted in the harms this Court predicted. Representatives from majority-minority districts fairly and conscientiously represent the interests of their constituents—regardless of race. Further, the fact that the challenged districts were created, in part, to give political voice and electoral power to African-American communities of interest is not demeaning. Rather, the creation of these districts represents recognition of the bonds that often form among those with a common racial heritage and a shared experience of past and present racial discrimination.

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[1] The Caucus also joins appellees' argument that the lower court incorrectly found that race was the predominant factor in the drawing of the challenged districts.

II.

MAJORITY-MINORITY DISTRICTS ARE A CRITICAL TOOL FOR ACHIEVING A TRULY REPRESENTATIVE POLITICAL SYSTEM

The redistricting processes that took place across the country after the 1990 Census led to significant gains in the number of minority congressional representatives. As a result, Congress is more racially diverse today than ever in our Nation's history. Currently, there are 40 African Americans in Congress, 17 Hispanic Americans, 5 Asian Americans and 1 Native American.[2] The current diversity in Congress is, in large part, due to the creation of majority-minority districts.

Prior to Reconstruction and the passage of the Fourteenth and Fifteenth Amendments to the Constitution, no African American served in Congress. From 1901 to 1928, there were no African Americans in Congress; from 1929 to 1944, there was but one.[3] And, the voice of that lone Negro, Congressman Arthur Mitchell, was all but drowned out by the antagonistic posturing of his white colleagues.[4] From 1945 to 1955 there were only two African

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[2] *See* David A. Bositis, African Americans and the 1994 Midterms: What Happened? (1994) [hereinafter Bositis, The 1994 Midterms].

[3] For a list of African Americans who have served in Congress *see* Appendix A hereto.

[4] During the 1936 Democratic convention, for example, Congressman Mitchell's own party rejected his participation in the electoral process: "Congressman Mitchell's presence on the podium . . . was used as an excuse for a U.S. Senator from South Carolina and eight other delegates to stage a walkout in protest." William L. Clay, *Just Permanent Interests: Black Americans in Congress: 1870-1991* at 72 (1992). In addition to slights inflicted by his political colleagues, Congressman Mitchell suffered indignities in a variety of contexts. For example, Congressman Mitchell was forced to ride in the coach car during a train ride to Arkansas, despite

(continued...)

Americans. Regardless of the levels of charisma and capabilities possessed by these two representatives, their number prevented them from moving their colleagues to adopt and embrace an agenda of full inclusion. In 1957, when the number of African Americans in Congress doubled, to four, America was still far from a representative democracy.

Our country took a giant leap toward achieving its pluralist ideals, with enactment of the Voting Rights Act of 1965,[5] which paved the way for increasing numbers of African Americans to gain access to polling booths, state legislatures and the United States Congress. By the 1980's there were approximately twenty African Americans in Congress and a significant increase occurred after the elections of 1992, which brought the tally of Caucus members to 40.

North Carolina's First and Twelfth Districts and other majority-minority districts have moved America toward the ideal of a representative democracy, one that encourages the inclusion of all Americans in political discourse and decision making.

4/(...continued)
his possession of a first-class ticket. Congressman Mitchell later testified that after the conductor was informed that Mitchell was a Congressman, the conductor replied "it didn't make a damn bit of difference who I was, that as long as I was a nigger I couldn't ride in that car." Congressman Mitchell considered pressing the issue further, but, as he testified, "I thought maybe I had better not; being the only negro in Congress . . . I had better not get lynched on that trip." A. L. Higginbotham, Jr. & W. C. Smith, *The Hughes Court and the Beginning of the End of the "Separate But Equal" Doctrine*, 76 Minn. L. Rev. 1099, 1103 (1992) (quoting *Mitchell* v. *U.S. Commerce Comm's.*, 313 U.S. 80 (1941)).

5/ 42 U.S.C. § 1973 *et. seq.* (1988).

A. Religious, Racial, and Ethnic Groups Form the Building Blocks of Our Pluralist Democracy

As this Court has noted, all districting involves classifying voters into groups, including groups defined by race or ethnicity.[6] As Justice O'Connor has acknowledged, the reapportionment process has traditionally involved political accommodation of the "competing claims of political, religious, ethnic, racial, occupational and socioeconomic groups."[7] Yet,

> [u]ntil now, no constitutional infirmity has been seen in districting Irish or Italian voters together, for example, so long as the delineation does not abandon familiar apportionment practices. If Chinese-Americans and Russian-Americans may seek and secure group recognition in the delineation of voting districts, then African-Americans should not be dissimilarly treated. Otherwise, in the name of equal protection, we would shut out "the very minority group whose history gave birth to the Equal Protection Clause."

Miller, 115 S. Ct. at 2506 (Ginsburg, J., dissenting) (quoting *Shaw*, 113 S. Ct. at 2845 (Stevens, J., dissenting)). In the context of America's unique history, it is essential that this Court recognize that African Americans, like other racial and ethnic groups, often form communities with distinct political interests.

In *Shaw*, and again in *Miller*, this Court warned that districting that recognizes shared interests among African Americans "may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no

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6/ *See Shaw*, 113 S. Ct. 2816, 2826 (1993); *Miller*, 115 S. Ct. 2475, 2488 (1995).

7/ *Davis* v. *Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring).

longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Miller*, 115 S. Ct. at 2486; *see Shaw*, 113 S. Ct. at 2832. As the history of racial violence and segregation detailed in Part III, *infra*, demonstrates, North Carolina has been "balkanized," *i.e.*, divided into hostile groups, for over one hundred years. The 1992 redistricting legislation did not create or even exacerbate these racial divisions.

Rather, North Carolina's 1992 redistricting legislation empowered and enfranchised those who long have been excluded from North Carolina's political life. A large proportion of white voters in North Carolina are resistant to voting for African-American candidates or for any candidate who supports initiatives perceived to be favorable to African Americans.[8] According to James M. O'Reilly, a political demographer involved in North Carolina politics for over 15 years, the possibility of an African-American candidate in North Carolina obtaining 30 or 40 percent of the white vote is remote in North Carolina, if not inconceivable.[9] As support for their argument against race-conscious districting, appellants point to the ability of African Americans *in other states* to be elected in majority-white congressional districts and to the widespread popularity of General Colin Powell—a man for whom not one vote has been cast by anyone—as examples of why majority-minority districts are unnecessary. (App. Brief at 30 n.26). These examples, however, ignore the persistent inability of African Americans to be elected from majority-white districts in North Carolina.[10] Far from balkanizing North Carolina, the

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[8] Expert Witness Statement of James M. O'Reilly, at 2.

[9] *Id.*

[10] These examples also ignore the racism of North Carolina voters who have rejected even white candidates who support racial inclusion. *Cf. Thornburg* v. *Gingles*, 478 U.S. 30, 74-77 (noting that proof that some minority candidates have been successful does not foreclose a § 2 Voting (continued...)

challenged districts have created a North Carolina delegation that is better suited to represent North Carolina's racially diverse population.[11] The newly-integrated North Carolina delegation also has created a more pluralistic Congress.

B. The Importance of Pluralism in American Government

A pluralist democracy is the antidote to the hostility associated with "balkanization," "segregation," and "political apartheid." Pluralism enables individuals from different backgrounds to learn of the experiences, concerns, and opinions of others. The sharing of life experience—which is the first step toward understanding—is indisputably necessary if our American democracy is to thrive. Pluralism does not mean, however, that only a person of one race will be able to legislate a matter fairly when her or his race is involved. Instead, pluralism guards against the influences of individual prejudice and further creates a milieu in which the entire congressional system benefits from the multi-faceted experiences of its members. In the context of the judiciary, Professor Charles Warren characterized the limitations of homogeneity in this way:

> The Court is not an organism dissociated from the conditions and history of the times in which it exists. It does not formulate and deliver its opinions in a legal vacuum. Its Judges are not abstract and impersonal oracles, but are men whose views are necessarily, though by no conscious intent, affected

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[10](...continued)
Rights Act claim).

[11] Approximately 20 percent of the voting-age population in North Carolina is African American.

> by inheritance, education and environment and by the impact of history past and present.[12]

On a homogeneous court, no "outsider" challenges the biases the dominant group accepts as "self-evident" truths. As Justice Sandra Day O'Connor wrote of Justice Thurgood Marshall:

> At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.[13]

Justice O'Connor concluded that "outsiders'" stories "made clear what legal briefs often obscure: the impact of legal rules on human lives."[14]

Professor Warren's and Justice O'Connor's comments about the importance of pluralism apply equally to a legislature and its members. An unrepresentative legislature may articulate precepts or enact laws that seem appropriate to its members, who never imagine that their views may be nothing more than the "'prejudices' they

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[12] 1 Charles Warren, *The Supreme Court in United States History* 2 (1926).

[13] Sandra D. O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217, 1217 (1992).

[14] *Id.*

'share with [some of] their fellow-men.'"[15] The American experience is replete with examples of such governmental biases.[16]

The benefits of a representative Congress are manifold. First, the decisions made by a representative Congress carry an air of legitimacy that is absent when decisions are made by a homogeneous body. The decision to commit forces to combat, for example, bears much less legitimacy when the legislative body acting in support of that decision does not well represent the soldiers sent to combat. During the 1991 Gulf War, Congress was faced with the decision whether to commit American forces—forces that are disproportionately black and poor—to combat. The congressional debate regarding the deployment of troops to Iraq was criticized as potentially illegitimate and unfair precisely because the composition of the Congress did not accurately reflect the composition of the community from which the soldiers sent into combat would come.[17]

Another example of the power of a pluralist legislature was recently demonstrated when the Senate Ethics Committee investigated Senator Packwood. The presence of women on the Ethics Committee and in the Senate forced the Senate to seriously address the misconduct of one of its own members. Such a searching

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[15] Oliver W. Holmes, *The Common Law* 1 (1881) ("[E]ven the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.").

[16] *The Congressional Quarterly*, describing the passage of the 1965 Voting Rights Act, detailed twelve critical civil rights initiatives defeated in Congress—two anti-lynching statutes, five initiatives addressing poll taxes and literacy tests, three bills concerning fair employment practices, and two Civil Rights Acts. *See Cong. Q. Almanac* 551 (1965). Similarly, sexism influenced Congress and state legislatures, which in 1871 incorporated gender in the Fifteenth Amendment to ensure women did not gain suffrage. *See* Eleanor Flexner, *Century of Struggle*: The *Women's Rights Movement in the United States* 152 (rev. ed. 1975).

[17] *The Killing Fields Aren't Level*, N.Y. Times, Jan. 28, 1991, at A2.

inquiry would have been inconceivable even three years ago when there were only two women in the Senate.

In addition, a Congress comprised of representatives with varied backgrounds and experiences can bring their wealth of insight and perspective to bear on national issues that require innovative solutions. More often than not, congressional homogeneity and exclusivity are deterrents to rather than promoters of, innovation.

Finally, a pluralist Congress also ensures that issues of concern to African Americans and other racial minorities are consistently a part of the national agenda. For example, because of the influence of African-American voters in North Carolina's majority-minority districts, the representatives from these two districts can, in concert with other Caucus members, inform Congress of issues of special concern to all African-American North Carolinians.[18] As long as these districts remain majority-minority districts, it is likely that the interests of the numerous historically black colleges in North Carolina will be aggressively addressed; that redlining practices of banks affecting black neighborhoods will be closely scrutinized; and that cutbacks to social services will be challenged by representatives ready to dispute stereotypes of lazy black men and welfare mothers. Furthermore, unlike some of their predecessors who attempted to thwart the interests of

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[18] In *Shaw* and *Miller*, the Court found the notion that individuals of the same race share political interests "demeaning." *Miller*, 115 S. Ct. 2475, 2486 (1995); *Shaw*, 113 S. Ct. 2816, 2827 (1993). And, indeed, it is true that the African-American community in North Carolina is diverse. For example, the interests of an African American who has been displaced due to the decline in agricultural jobs may differ from those of an African-American businesswoman who has been denied a loan by several banks. The North Carolina legislature, cognizant of that fact, created two majority-minority districts to reflect the different common interests of those in urban and rural settings. However, the fact remains that, with respect to some issues, an African-American farm worker and an African-American business person may have more in common with each other than with their white neighbors. Such an acknowledgment is not demeaning; it is realistic.

African-American voters, these representatives can support civil rights initiatives without fear that taking a principled stand will end their political careers.

A Congress with members of all colors and both genders brings more American citizens into the political system, announces that government is for all Americans, increases the confidence of all American voters in the government and thereby cultivates political participation by all. Thus, the challenge in this and other voting rights cases is whether the significant racial pluralism finally occurring in the United States Congress will prevail—whether the voices and interests of minorities will be welcomed in the public debate—or will be silenced once more.

III.

THE HISTORY OF DISCRIMINATION IN NORTH CAROLINA JUSTIFIED THE CREATION OF TWO MAJORITY-MINORITY DISTRICTS

This Court held in *Miller* v. *Johnson*, that where race is the predominant factor motivating redistricting legislation such legislation is constitutional only if it is "narrowly tailored to further a compelling governmental interest."[19] The phrases "narrowly tailored," and "compelling governmental interest" are not self-defining. Accordingly, wise evaluation of majority-minority redistricting plans requires viewing them in proper historical perspective, applying the maxim of Justice Oliver Wendell Holmes: "a page of history is worth a volume of logic."[20] The political history in North Carolina is replete with examples of *de jure* discrimination and racial intimidation and violence. This history has created a current climate in which majority-minority districts are

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[19] *See Miller*, 115 S. Ct. 2475, 2482 (1993); *Shaw*, 113 S. Ct. 2816, 2818 (1995).

[20] *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921).

necessary to ensure that African-American voters are fairly represented.

A. North Carolina Had A Compelling Interest in Engaging in Race-Conscious Districting to Remedy the Legacy of Racial Discrimination in the North Carolina Political System

The Fifteenth Amendment, ratified in 1870, declares that the right to vote "shall not be denied . . . by any State on account of race." Notwithstanding this direct constitutional command, North Carolina and other southern states have only recently abandoned—after being forced to do so by the Voting Rights Act and federal court enforcement of the same—policies and practices designed to exclude African Americans from full political participation. North Carolina's long legacy of racial exclusion began not long after ratification of the Fifteenth Amendment.

In 1898, white Democrats launched a "White Supremacy Campaign." Fannifc.l M. Simmons, North Carolina Democratic Party Chairman, issued the following warning to his fellow white North Carolinians, which captures the racial attitudes of this period:

> NEGRO CONGRESSMEN, NEGRO SOLICITORS, NEGRO REVENUE OFFICERS, NEGRO COLLECTORS OF CUSTOMS, NEGROES in charge of white institutions. NEGROES in charge of white schools, NEGROES holding inquests over the white dead . . . .[21]

He then declared:

> North Carolina is a WHITE MAN'S state, and WHITE MEN will rule it, and they will crush the party of Negro domination beneath a majority so overwhelming that no other party will ever again dare to attempt to establish negro rule here.[22]

White passions were so inflamed by this type of rhetoric that violence directed at African Americans and white Republicans was rampant. A particularly militant white group, the Red Shirts, armed themselves "with Winchester rifles and shotguns . . . . [and] stalked about, frightening Republicans, Fusionists, and blacks away from the polls."[23]

Legislators, newly-elected as a result of this campaign, enacted a program to enforce with laws the racial exclusion and segregation the campaign had accomplished by violence.[24] The enactment of legislation that would obliterate political participation by African Americans was primary on the agenda of these legislators. They submitted a constitutional amendment to the voters that conditioned the right to register and vote on a poll tax and a literacy test with a "grandfather clause" to protect the voting rights of illiterate white men.

North Carolina's governor from 1901 to 1903, Charles B. Aycock, set the tone for a lengthy period of African-American political exclusion ushered in by the White Supremacy Campaign. Governor Aycock proclaimed:

> I am proud of my State, moreover because there we have solved the Negro problem . . . . We have taken him out of politics and have thereby secured good government under any party and laid

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[21] J.A. 611.

[22] *Id.*

[23] H. Leon Prather, Sr., *The Red Shirt Movement in North Carolina 1898-1900*, 62 J. Negro Hist. 174, 179 (1977).

[24] These legislators were, no doubt, emboldened by the 1896 Supreme Court decision of *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

foundations for the future development of both races.

> I am inclined to give you our solution to this problem. It is first, as far as possible under the Fifteenth Amendment to disfranchise him; after that let him alone, quit writing about him; quit talking about him . . . let the Negro learn once and for all that there is unending separation of the races . . . that they cannot intermingle; let the white man determine that no man shall by act or thought or speech cross this line, and the race problem will be at an end.[25]

Other North Carolina leaders also expressed their commitment to policies of racial exclusion. North Carolina Governor Thomas Walter Bickett proclaimed in 1920:

> In North Carolina we have definitely decided that the happiness of both races requires that the white government shall be supreme and unchallenged in our borders.[26]

John Parker, upon accepting the 1920 Republican nomination for Governor of North Carolina, stated:

> The Negro as a clan does not desire to enter politics. The Republican party of North Carolina does not desire him to do so. We recognize the fact

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[25] Charles B. Aycock, Speech before the North Carolina Society, Baltimore (Dec. 18, 1903), in *The North Carolina Experience: An Interpretive and Documentary History* 415 (Lindley S. Butler & Alan D. Watson eds., 1984).

[26] Thomas W. Bickett, Message to the General Assembly of 1920, in *Public Letters and Papers of Thomas Walter Bickett, Governor of North Carolina 1917-1921* at 72 (R.B. House ed. 1923).

> that he has not yet reached the stage in his development when he can share the burdens and responsibilities of government.[27]

The racial hostility of North Carolina's leaders and citizens, literacy tests and poll taxes all worked together to eliminate African-American political participation in North Carolina. Having accomplished this goal, incidents of racial violence and explicit racial appeals subsided until 1948, when the national Democratic Party included a civil rights plank in its campaign platform. From this point forward, North Carolina has experienced a resurgence of appeals to racial prejudice. History has taught us that in America the perception that African Americans are gaining political power can often trigger fear, anger, or, at the very least, anxiety among some whites. This phenomena has motivated violence and direct and subtle racial campaign appeals.

In 1950, Willis Smith used racial appeals to defeat incumbent Frank Porter Graham in a Democratic primary campaign for nomination to the United States Senate. Graham had been a prominent supporter of New Deal policies and had given qualified support to the civil rights policies of the Truman Administration. In the runoff primary of 1950, supporters of Willis Smith distributed leaflets warning **"White People Wake Up! . . . Frank Graham Favors Mingling of the Races."**[28] In a racially-charged atmosphere, this accusation and others were sufficient to cost Graham the election.[29]

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[27] John Parker, An Address Upon Accepting the Republican Nomination for Governor (April 18, 1920), *quoted in* Richard L. Watson, *The Defeat of Judge Parker: A Study in Pressure Groups and Politics*, 50 Miss. Valley Hist. Rev. 213, 218 (1963).

[28] J.A. 614.

[29] Expert Witness Report Prepared by Professor Harry L. Watson, Race and Politics in North Carolina, 1865-1994 at 11-12 [hereinafter Watson (continued...)

After the *Brown* v. *Board of Education* decision in 1954, white fears of desegregation increased as did political appeals to racial prejudice. In 1955, for example, North Carolina Senator Sam Ervin drafted the "Southern Manifesto" pledging resistance to the desegregation process ordered by the United States Supreme Court *Brown* decision. Two of the three North Carolina representatives who refused to endorse the Southern Manifesto lost their bids for reelection after a vigorous campaign by segregationist groups.[30]

Moreover, North Carolina's history of discrimination in the electoral process is not confined to the Reconstruction and post-*Brown* eras. Even after passage of the Voting Rights Act, appeals to white racial fears have persisted in North Carolina elections. In 1966, two Democratic congressmen were defeated in a campaign in which Ku Klux Klan leaders handed out leaflets charging that the incumbents had bowed to federal pressures for desegregation.[31] George Wallace's 1968 presidential campaign appealed to voters' fears of court-ordered busing.[32] And, Jesse Helms, in his bid for Senate in 1972, received a public endorsement from the Grand Dragon of the North Carolina Ku Klux Klan.[33]

In the 1980's and 1990's, North Carolina's legacy of race-baiting campaigns has continued unabated. In 1983, an advertisement supporting Jesse Helms' bid for governor against Jim Hunt depicted Hunt sitting beside Jesse Jackson with accompanying

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[29](...continued)
Report].

[30] J.A. 615.

[31] J.A. 617.

[32] *Charlotte News*, Oct. 29, 1968, at 5C.

[33] J.A. 618.

quotations warning of the prospect of increased voter registration.[34] Commenting on this type of ad, one journalist remarked, "the primary motive is simply to make the association between Hunt and blacks and to raise fears among whites that Hunt is a captive of black voters."[35]

Helms and the Republican party used a multitude of racially-oriented signals during Helms' 1990 bid for reelection to the Senate against an African-American candidate, Harvey Gantt. Representative J. Alex McMillan of the 9th District fanned racial fears with a 1990 fundraising letter that warned of "the potential danger of a sophisticated get-out-the-vote effort among the hard core Gantt constituency."[36] Gantt had been leading Helms in the polls until the final week of the race when the Helms campaign ran an advertisement showing a white man's hand crumpling a job rejection notice, with a voice-over explaining:

> You needed that job, and you were the best qualified. But they had to give it to a minority because of a racial quota. Is that really fair? Harvey Gantt says it is. Gantt supports Ted Kennedy's racial quota law that makes the color of your skin more important than your qualifications.[37]

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[34] *Id.*

[35] Watson Report, *supra* note 29, at 18 (citing *What North Carolina Newspapers Say About Voter Registration*, News of Orange County, June 8, 1983).

[36] J.A. 624.

[37] Kathleen H. Jamieson, *Dirty Politics* '80 at 97 (1992).

This advertisement galvanized white support for Helms, bringing him victory.[38] During the same campaign season, an anonymous leaflet appeared in rural Columbus County, warning voters of "the Negro vote" and of the possibility that "more Negroes will vote in this election than ever before."[39]

In the 1992 presidential campaign, local Republican Party advertisements warned "[I]f Bill Clinton is elected President, Jesse Jackson will be a U.S. Senator."[40] Significantly, the modern pattern of using race to contaminate the electoral process has not been confined to inciting the racial fears of whites. Rather, the political environment in North Carolina is, in many ways, reminiscent of North Carolina's earlier history of intimidating African Americans away from polling booths. For example, the North Carolina Republican Party engaged in a massive "postcard campaign," mailing postcards to black voters to discourage them from voting by threatening prosecution of voters who gave false information to local Board of Elections officials. *See United States* v. *North Carolina Republican Party*, 91-161-Civ-5F (E.D.N.C. Feb. 27, 1992).

The continued vigor of racial discrimination in North Carolina is not surprising. Indeed, a mere decade ago federal courts found that North Carolina's *de jure* exclusion of African Americans from the voting process—with, among other means, a poll tax, a literacy test, and a prohibition against bullet voting[41]—had

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[38] *Id.* at 99-100.

[39] Watson Report, *supra* note 29, at 21.

[40] *Id.* (citing Fayetteville Observer-Times, Oct. 27, 1992, 6A).

[41] Bullet voting is a practice designed to maximize a group's voting strength in at-large voting schemes. In at-large districts—where multiple seats are filled in a single election—voters may cast one vote for as many candidates as there are seats available. Thus, if there are five seats available, each voter may cast a vote for five of the candidates running. In (continued...)

contributed to the continuing suppression of African-American participation in North Carolina's political process.[42] In the *Gingles* opinion, the district court expressed hope that continued registration efforts would overcome the chilling effect of North Carolina's legacy of racial exclusion and political appeals to racial prejudice.[43] However, the lingering effects of historic discrimination in voting—as well as in other facets of civic life—persist.

The exclusion of African Americans from participating in North Carolina's political system has served to reinforce the legacy of racial segregation. For example, black North Carolinians endure poverty, inadequate education and medical care, infant mortality, unemployment and violent crime more acutely than their white counterparts.[44] A shared history of political exclusion and discrimination has created among North Carolinians a shared interest in effective political participation, including the ability to elect candidates of their choice.[45] North Carolina's 1991 redistricting legislation was not only a step toward recognizing that African-American North Carolinians disproportionately suffer from

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[41](...continued)
the case of bullet voting, instead of casting all of their votes, voters vote only for a "target" candidate, thereby avoiding the dilution of their vote that would result from voting for a full slate. Bullet voting provides gains to the "target" candidate relative to other candidates and therefore increases the likelihood of minority representation.

[42] *See Gingles* v. *Edmisten*, 590 F. Supp. 345, 359-61 (E.D.N.C. 1984), *modified sub nom.*, *Thornburg* v. *Gingles* 478 U.S. 30 (1986).

[43] *Gingles*, 590 F. Supp. 345, 361.

[44] J.A. 194-99.

[45] *See Thornburg* v. *Gingles*, 478 U.S. 30, 64 (1986) (acknowledging racial groups frequently share socioeconomic characteristics such as income level, education, employment status, living conditions, language patterns and more).

the above-mentioned harms, but also a step toward remedying them through the democratic process.

B. Majority-Minority Districts Are Necessary Tools to Offset the Effects of Racially-Polarized Voting and Past Discrimination

The above-described legacy of *de jure* discrimination and race baiting campaign tactics has had a deleterious effect on African-American political participation. In addition, race-conscious districting in North Carolina, which began well before the 1992 legislation, also has contributed to the exclusion of African Americans from political discourse. North Carolina traditionally has considered race in making districting decisions. However, only in 1992 was the goal of North Carolina legislators to enhance minority representation, rather than to diminish it.

When first enfranchised, African-American men demonstrated an overwhelming preference for Republican candidates.[46] When Democrats attained a majority in the legislature in 1870, after a campaign of widespread violence and intimidation against African-American and white Republicans, they enacted redistricting legislation that "stacked" African Americans into one congressional district. This district came to be known as the "Black Second."[47] From 1872 until full disenfranchisement of African Americans in 1900, the Black Second contained twice the number of African Americans as their equal distribution would have dictated, thereby limiting African-American control to a maximum

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[45] Watson Report, *supra* note 29, at 5.

[47] Expert Witness Report Prepared by J. Morgan Kousser, After 120 Years: Redistricting and Racial Discrimination in North Carolina, at 28 (citing Eric Anderson, *Race and Politics in North Carolina, 1872-1901: The Black Second* (1981)) [hereinafter Kousser Report].

of one district out of nine or ten (depending on the total population in the decade).[48]

The Black Second offered several positive political benefits. African-American voter participation thrived during this period. Up to 85% of potential African-American voters participated in elections during the 1890's.[49] From 1872 to 1900, more than fifty African Americans were elected to the state legislature from areas included in the Black Second. During the same period, the Black Second sent three African Americans to Congress, including, in 1898, George White, the last African American to serve from the South for 72 years.[50]

As Congressman White exited Congress in 1901, North Carolina entered a long period marked by the complete exclusion of African Americans from political participation. When the Voting Rights Act prevented North Carolina from using laws designed to completely eliminate African Americans from the political landscape, North Carolina legislators began to engage instead in redistricting schemes designed to dilute black voting strength.

For example, North Carolina legislators sought a means of minimizing the political influence of the large, politically well-organized black community of Durham County. In 1965, when a redistricting plan would have joined Durham, Wake and Orange counties, conservatives in Wake County protested. Wake County

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[48] *Id.*

[49] Kousser Report, *supra* note 47, at 29.

[50] *See* William R. Keech & Michael Sistrom, "North Carolina," in *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990* (C. Davidson & B. Grofman 1994) [hereinafter Quiet Revolution].

Senator Jyles Coggins warned colleagues about a districting plan that might result in, "Negro block [sic] vot[ing]."[51]

During the 1981 redistricting process, Congressman L.H. Fountain—a conservative, white opponent of the civil rights movement representing a district with a large black population—waged a hard fought battle to minimize the number of African Americans in his district. Congressman Fountain ultimately lost this battle after the United States Department of Justice denied the redistricting plan preclearance.[52] As a result, the African-American population in Congressman Fountain's district ultimately grew to 40 percent of the total voting-age population.[53]

Yet, even with a 40 percent African-American population, substantial barriers to black electoral success remained. An African-American candidate, H.M. "Mickey" Michaux ran for Congress in Congressman Fountain's former district against a white Democrat, Tim Valentine.[54] Although Michaux led in the first primary, he ultimately lost after Valentine ran ads invoking white fears of black political power. His ads warned voters that Michaux would benefit from "the same well organized block [sic] vote" and that "my opponent will again be bussing his supporters to the polling place in record numbers."[55] Valentine was ultimately victorious, despite the fact that Michaux received over 90 percent of the black vote.[56] Valentine's use of appeals to racial fears intensified racially

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[51] J.A. at 621.

[52] J.A. 622-23.

[53] J.A. 623.

[54] *Id.*

[55] *Id.*

[56] *See* Declaration of State Representative Henry M. Michaux.

polarized voting, resulting in defeat for the candidate preferred by the vast majority of the African-American population in that district.

As previously noted, the goal of *all* districting is to ensure that the votes of numerical minorities are not consistently submerged by those of the majority. Michaux's defeat illustrates that majority-minority districts, including those challenged in this case, are necessary to ensure that racial minorities have the ability to elect candidates of their choice. Thus, the lingering effects of North Carolina's history—in racist political exclusion, in racial appeals in political campaigns, in redistricting practices—provided a compelling state interest for the creation of the districts challenged in this litigation. *See Shaw* v. *Hunt*, 861 F. Supp. 408, 464-65, 476 (E.D.N.C. 1994).

IV.

REPRESENTATIVES FROM THE CHALLENGED DISTRICTS ASSIDUOUSLY REPRESENT THE INTERESTS OF ALL THEIR CONSTITUENTS

In *Shaw*, this Court stated its fear that representatives from majority-minority districts may "believe that their primary obligation is to represent only members of that group, rather than their constituency as a whole." *Shaw*, 113 S. Ct. at 2827. Because appellants—did not and could not—submit proof that Representatives Clayton and Watt have failed to represent their interests, the Court should presume that Representatives Clayton and Watt have fully represented appellants and the rest of their constituents. *See Davis* v. *Bandemer*, 478 U.S. 109, 132 (1986). However, even without the benefit of such a presumption, the evidence presented below demonstrated that Representatives Clayton and Watt well represent their constituents of all races.

As a practical matter, the racial makeup of the challenged districts renders it improbable that Representatives Clayton or Watt would ignore their white constituents. Both of the challenged districts have voting-age populations that are approximately

53 percent black, 45 percent white and 3 percent other races. Accordingly, Representatives Clayton and Watt must court the votes of their constituents without regard to race, if they seek to be reelected.[57]

In addition, those appellants who belong to the Democratic Party certainly have suffered no "representational injury." Representatives Clayton and Watt have voting records, which are essentially indistinguishable from their white Democratic Party partisans.[58] Nor can Republican constituents in these districts claim representational injury, "because one's constitutional rights are not violated merely because the candidate one supports loses the election." *Shaw*, 113 S. Ct. at 2846 (1993) (Souter, J., dissenting) (citing *Whitcomb* v. *Chavis*, 403 U.S. 124, 153-55 (1971)).

In fact, Representatives Clayton and Watt endeavor—as do all Caucus members—to effectively represent all of their constituents.[59] Their ability to ably represent their constituents is enhanced by the communities of shared interests within both districts. For example, many constituents in Congresswoman Clayton's district either currently reside in agricultural settings or are displaced agricultural workers. Accordingly, Clayton has become a member of the House Committees on Agriculture and Small Business. Constituents in Congressman Watt's district, by

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[57] *Cf. Gingles* v. *Edmisten*, 540 F. Supp. 345, 358 n.21 (1984) (sixty percent black population generally considered necessary to ensure effective voting majority), *modified sub nom.*, *Thornburg* v. *Gingles*, 478 U.S. 30 (1986).

[58] *See* 52 Cong. Quarterly Weekly Report 3656-67 (1994).

[59] By contrast, for centuries many white legislators at all levels of government have acted against the interests of their African-American constituents. For example, as noted in Part III, Congressman Fountain represented a district with a population that was 40 percent African American, yet he opposed the Civil Rights movement and its legislative enactments.

contrast, reside primarily in urban settings, and the district is characterized by the presence of many financial institutions, and historically black colleges. In order to further the wide range of interests among his constituents, Congressman Watt sits on the House Committee on Banking, Finance and Urban Affairs.

In addition, Representatives Clayton and Watt serve the shared interests of African Americans in their respective districts and in North Carolina as a whole. Judicial recognition of the frequency with which African Americans form communities with distinct political interests is neither "demeaning" nor evidence of unfair "stereotyping." Rather, as Justice Ginsburg noted in *Miller*:

> [E]thnicity itself can tie people together, as volumes of social science literature have documented—even people with divergent economic interests. For this reason, ethnicity is a significant force in political life.
>
> . . . .
>
> To accommodate the reality of ethnic bonds, legislatures have long drawn voting districts along ethnic lines. Our Nation's cities are full of districts identified by their ethnic character—Chinese, Irish, Italian, Jewish, Polish, Russian, for example . . . . The creation of ethnic districts reflecting felt identity is not ordinarily viewed as offensive or demeaning to those included in the delineation.[60]

The Caucus maintains that there are African American communities of interest in the challenged districts. However, we also note, along with Justices Stevens and Souter, that if there are no common interests to be found among African Americans in North Carolina, there is *ipso facto*, no "representational injury" suffered by

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[60] *Miller*, 115 S. Ct. 2475, 2504-5 (1995) (Ginsburg, J., dissenting).

appellants by virtue of their placement in a majority-minority district and representation by an African-American congressperson.[61]

Finally, Representatives Clayton's and Watt's abilities to serve the interests of their African-American constituents in no way diminishes their abilities to well represent their constituents of other races. Both representatives have undertaken to make themselves accessible to their constituents and to keep their constituents well informed about events in Congress. Congresswoman Clayton, for example, has installed a toll-free phone line to enhance the ability of her largely, low-income rural constituents to communicate with her.[62] In addition, she visits all counties within her district during weekends and congressional recesses, and employs field representatives and case workers who maintain regular, publicized office hours. At the time of trial, she had held more than ten community forums on issues including health care, education, economic development and crime. She regularly informs her constituents of important events in Congress with a community newsletter. According to Congresswoman Clayton, her white constituents communicate their opinions and concerns to her regularly.[63]

Similarly, Congressman Watt reaches out to all his constituents. Upon taking office, Watt mailed every resident in his district a Guide to Constituent Services, containing the addresses and phone numbers of his offices and information regarding federal

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[61] *Id.*, at 2497-99 (1995) (Stevens, J., dissenting) (noting appellants' standing depends on assumption all black voters will support same candidate and successful candidate will ignore interests of white constituents); *see also Shaw*, 113 S. Ct. 2816, 2845-46 (Souter, J., dissenting) (acknowledging commonality of interest among racial minorities and absence of harm to white voters from mere placement in majority-minority districts) .

[62] Witness Statement of Congresswoman Eva M. Clayton at 5.

[63] *Id.*

agencies, passports, government documents and more.[64] Congressman Watt is so adamant about maintaining direct contact with his constituents that he has instituted a policy that his phone calls not be screened.[65] In addition to Congressman Watt's offices in Durham, Greensboro and Charlotte, Congressman Watt employs a mobile caseworker who maintains office hours in municipal facilities throughout each area of the district. The Congressman regularly mails information to mayors and city managers in his district regarding the impact of federal legislation. His mailings have addressed empowerment zones, the earned income tax credit and community banking legislation. Finally, like Congresswoman Clayton, Congressman Watt has conducted several town meetings, where black and white constituents alike express their concerns and opinions.[66]

The evidence below clearly demonstrated that Representatives Clayton and Watt have served all their constituents effectively, and appellants have not suffered any "representational harm" due to their residence in a majority-minority district.

V.

SHAW AND *MILLER* WERE WRONGLY DECIDED

In the event this Court finds itself obligated by the standards set forth in *Shaw* and *Miller* to hold that the challenged districts violate the Equal Protection Clause, we submit that the Court should take this opportunity to repudiate the holdings of those two cases pursuant to the rationale articulated in *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995).

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[64] Witness Statement of Congressman Melvin L. Watt ¶ 16(b) and Exhibit B attached thereto.

[65] *Id.* at ¶ 16(c).

[66] *Id.* at ¶ 16(f).

In *Adarand*, the Court abandoned principles laid out in a case decided only five years earlier. In departing from such recent precedent, Justice O'Connor, writing for the majority, acknowledged that

> [r]emaining true to an "intrinsically sounder" doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete. In such a situation, "special justification" exists to depart from the recently decided case.

Id., 115 S. Ct. at 2115. This Court should be no less reluctant to depart from the holdings of *Shaw* and its progeny, because, like *Plessy v. Ferguson*, *Shaw* was wrong the day it was decided.[67]

Conclusion

Although all parties long for the day when one's race has little or no effect on the quality of one's life, appellees and the Caucus realize that because that day has not arrived, majority-minority districts are necessary. Americans of all races see the world through prisms colored by their individual and collective pasts. For this reason, a district that to some resembles a "bug splattered on a windshield," may to others look more like a winding path leading to

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[67] In *Fullilove v. Klutznick*, 448 U.S. 448, 522 (1980), Justice Rehnquist joined Justice Stewart's view that "*Plessy v. Ferguson* was wrong when decided." This view has been endorsed by two members of the *Shaw* majority. *See Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2813 (1993) ("[W]e think *Plessy* was wrong the day it was decided.") For an argument that *Shaw* was wrongly decided, *see* A. Leon Higginbotham, Jr., G. Clarick, & M. David, *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 Fordham L. Rev. 1593 (1994).

political inclusion. Racism persists in America; African Americans routinely suffer racism in their daily lives. Many whites still clutch their purses to their chests when an African American approaches. Store clerks still shadow African-American shoppers as they attempt to make selections. And, many corporate executives and law firm partners still look past brown and black faces when searching for a bright young star to mentor or promote. The reality of life in the United States prevents African Americans from enjoying the luxury of pretending America is color blind. As this Court makes a decision fundamental to the future of our representative democracy, it must accept what most African Americans and many Americans of all races know to be true: race still matters.[68] In America today, voting is racially polarized and the color of a candidate's skin affects voter attitudes. In this light, the necessity of majority-minority districting to render our democracy representative is compelling.

The lower court in *Shaw* v. *Hunt* correctly decided that North Carolina's legacy of racial discrimination and political exclusion called out for a remedy. As a direct result of North Carolina's racist policies, from 1901 to 1993 no African American from North Carolina served in the United States Congress.[69] North Carolina's 1992 redistricting legislation represents a good faith effort to remedy its tragic history of racial exclusion. Now, for the first time in its history, North Carolina has an integrated congressional delegation that reflects the State's racial diversity.

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[68] *See* Cornel West, *Race Matters* 3 (1993):

> To engage in a serious discussion of race in America, we must begin not with the problems of black people but with the flaws of American society-flaws rooted in historic inequalities and longstanding cultural stereotypes. How we set up the terms for discussing racial issues shapes our perception and response to these issues.

[69] *See* Appendix A.

This Court should uphold the judgment of the district court below to the extent it found North Carolina's redistricting legislation to be a narrowly tailored means of serving a compelling state interest in redressing North Carolina's long history of racial discrimination and political exclusion. A decision upholding the constitutionality of the majority-minority districts in North Carolina would be in accord with the evidence presented below, based on the standards articulated in *Shaw* and *Miller*, and a rendering of justice.

Dated: October 25, 1995

Respectfully submitted,

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APPENDIX A

APPENDIX A:

AFRICAN AMERICANS IN THE U.S. CONGRESS, 1870–1995

United States Senate

Member	*Party-State*	*Years*
Hiram R. Revels	R-MS	1870-71
Blanche K. Bruce	R-MS	1875-81
Edward W. Brooke	R-MA	1967-79
Carol Moseley-Braun	D-IL	1993-

United States House of Representatives

Joseph H. Rainey	R-SC	1870-79
Jefferson F. Long	R-GA	1870-71
Robert B. Elliot	R-SC	1871-74
Robert C. De Large	R-SC	1871-73
Benjamin S. Turner	R-AL	1871-73
Josiah T. Walls	R-FL	1871-73
Richard H. Cain	R-SC	1873-75
		1877-79
John R. Lynch	R-MS	1873-77
		1882-83
James T. Rapier	R-AL	1873-75
Alonzo J. Ransier	R-SC	1873-75
Jeremiah Haralson	R-AL	1875-77
John A. Hyman	R-NC	1875-77

Charles E. Nash	R-LA	1875-77
Robert Smalls	R-SC	1875-79
James E. O'Hara	R-NC	1883-87
Henry P. Cheatham	R-NC	1889-93
John M. Langston	R-VA	1890-91
Thomas E. Miller	R-SC	1890-91
George W. Murry	R-SC	1893-95
		1896-97
George W. White	R-NC	1897-1901
Oscar DePriest	R-IL	1929-35
Arthur W. Mitchell	D-IL	1935-43
William L. Dawson	D-IL	1943-70
Adam C. Powell, Jr.	D-NY	1945-67
		1969-71
Charles C. Diggs, Jr.	D-MI	1955-80
Robert N.C. Nix	D-PA	1958-78
Augustus F. Hawkins	D-CA	1963-90
John Conyers, Jr.	D-MI	1965-
William L. Clay	D-MO	1969-
Louis Stokes	D-OH	1969-
Shirley A. Chisholm	D-NY	1969-82
George W. Collins	D-IL	1970-72
Ronald V. Dellums	D-CA	1971-
Ralph H. Metcalfe	D-IL	1971-78
Parren H. Mitchell	D-MD	1971-86
Charles B. Rangel	D-NY	1971-
Walter E. Fauntroy	D-D.C.	1971-90
Yvonne B. Burke	D-CA	1973-79
Cardiss Collins	D-IL	1973-
Barbara C. Jordan	D-TX	1973-78
Andrew J. Young	D-GA	1973-77
Harold E. Ford	D-TN	1975-
Bennett M. Steward	D-IL	1979-80
Julian C. Dixon	D-CA	1979-
William H. Gray	D-PA	1979-91
Mickey Leland	D-TX	1979-89
Melvin Evans	R-V.I.	1979-80
George W. Crockett, Jr.	D-MI	1980-90
Mervyn M. Dymally	D-CA	1981-92
Gus Savage	D-IL	1981-92
Harold Washington	D-IL	1981-83
Katie B. Hall	D-IN	1982-84
Major R. Owens	D-NY	1983-
Edolphus Towns	D-NY	1983-
Alan Wheat	D-MO	1983-94
Charles A. Hayes	D-MO	1983-92
Alton R. Waldon, Jr.	D-NY	1986-
Mike Espy	D-MS	1987-93

Floyd H. Flake	D-NY	1987-
John Lewis	D-GA	1987-
Kweisi Mfume	D-MD	1987-
Donald M. Payne	D-NJ	1989-
Craig A. Washington	D-TX	1989-94
Barbara R. Collins	D-MI	1991-
Gary A. Franks	R-CT	1991-
William J. Jefferson	D-LA	1991-
Eleanor H. Norton	D-D.C.	1991-
Maxine Waters	D-CA	1991-
Lucien E. Blackwell	D-PA	1991-94
Sanford Bishop	D-GA	1993-
Corrine Brown	D-FL	1993-
Eva M. Clayton	D-NC	1993-
James E. Clyburn	D-SC	1993-
Cleo Fields	D-LA	1993-
Alcee L. Hastings	D-FL	1993-
Earl F. Hillard	D-AL	1993-
Eddie B. Johnson	D-TX	1993-
Cynthia McKinney	D-GA	1993-
Carrie Meek	D-FL	1993-
Mel Reynolds	D-IL	1993-95
Bobby L. Rush	D-IL	1993-
Robert C. Scott	D-VA	1993-
Walter R. Tucker, III	D-CA	1993-
Melvin Watt	D-NC	1993-
Albert R. Wynn	D-MD	1993-
Bennie G. Thompson	D-MS	1993-
Sheila Jackson Lee	D-TX	1995-
Chaka Fattah	D-PA	1995-
Victor O. Frazer	I-V.I.	1995-
J.C. Watts	R-OK	1995-

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Nos. 94-923, 94-924

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RUTH O. SHAW, ET AL.

Appellants,

v.

JAMES B. HUNT, JR., ET AL.

Appellees.

JAMES A. POPE, ET AL.

Appellants,

v.

JAMES B. HUNT, JR., ET AL.

Appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina

BRIEF OF AMICI CURIAE NORTH CAROLINA LEGISLATIVE BLACK CAUCUS AND NORTH CAROLINA ASSOCIATION OF BLACK LAWYERS IN SUPPORT OF APPELLEES

INTERESTS OF AMICI CURIAE

The North Carolina Legislative Black Caucus is a bipartisan organization of African-Americans elected to the North Carolina General Assembly. Among its basic purposes is the promotion of fair and effective represen-

tation for all North Carolina citizens. Its members are elected from single-member districts in which African-American voters are a majority or from multi-member districts which have a substantial plurality of African-American voters. They have consistently supported the principle that all voters should have an equal opportunity to participate in the political process. They may be directly affected by the decision of the Court in this case.

The North Carolina Association of Black Lawyers (NCABL) is an unincorporated professional association operating in the State of North Carolina. One of the purposes of the NCABL is to promote a fair and representative system of government in the executive, legislative, and judicial branches, at all levels. NCABL members are lawyers who reside in and practice law in North Carolina, and law students enrolled in law schools in North Carolina. The NCABL membership is predominantly, but not exclusively, African-American.

Some NCABL members are themselves elected officials in the judicial and legislative branches of state government. Most having been elected from majority-black single-member districts, they have a continued interest in the legal standards controlling the creation of such districts. In addition, other members frequently represent plaintiffs in section 2 litigation at the local level in North Carolina, giving them an important and useful perspective on the issues raised by this appeal.

Counsel for all the parties have consented to the filing of this brief; their letters to that effect have been lodged with the Court.

SUMMARY OF ARGUMENT

The District Court properly rejected appellants' challenge to the composition of North Carolina's First and Twelfth Congressional Districts. For the reasons this Court laid down in *United States v. Hays*, 115 S.Ct. 2431 (1995), none of the appellants even has standing to challenge the First District; only two appellants -- Shaw and Shimm -- have standing to challenge the Twelfth. On the merits, the heart of those appellants' attack on the Twelfth District is a misreading of this Court's earlier decision in *Shaw v. Reno*, 113 S.Ct. 2816 (1993) (*Shaw I*), which appellants misconstrue to impose an independent requirement of aesthetic simplicity on the complex, multivariate balancing through which state political processes determine district boundaries.

Appellants proceed as though the irregular shape of the Twelfth District is not only evidence of a predominant racial motivation, but also a violation of an independent requirement that, in order to be "narrowly tailored" under the Constitution, districts drawn to comply with section 2 of the Voting Rights Act must be regularly shaped. Both components of appellants' argument are incorrect. This Court's precedents, and lower court decisions in keeping with this Court's directions, permit states to subordinate aesthetic regularity of boundaries to other concerns such as political fairness, protection of incumbents, and recognition of identifiable communities of interest. Courts have consistently approved jurisdictions' choices in the face of more compact and "traditional" alternatives because they have recognized that the less compact or more novel plans may better accommodate the state's many competing concerns. Appellants' attack

valuable in illuminating their lack of an injury in fact sufficient to confer standing. The forces that resulted in the Twelfth District's configuration placed Shaw and Shimm in the district *in spite of*, rather than because of, their race. Considerations other than North Carolina's responsibilities under section 2 -- equipopulousity, partisan concerns, incumbent protection, and the desire to draw distinctively urban and rural districts -- placed Shaw and Shimm in a district less compact than the one that would have resulted from an overriding concern with race. The "racial classification" Shaw and Shimm suffered was the work of the United States Census, without whose entirely constitutional activity in racially classifying the American population all remedial activity under the Voting Rights Act would be impossible. Their presence in the Twelfth Congressional District, however, resulted from non-racial considerations. The "predominant and overriding" consideration, indeed, was this Court's decisions in *Wesberry v. Sanders*, 376 U.S. 1 (1964), and *Karcher v. Daggett*, 462 U.S. 725 (1983), requiring that, for purposes of equipopulousity, additional inhabitants, of whatever race, be added to the African-American majority of voters in District Twelve. Because the activity about which appellants complain occurred "in spite of," rather than "because of" their race, under this Court's decision in *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), appellants have suffered no real injury.

Even worse than this empirical confusion are the constitutionally illicit premises on which appellants' position ultimately rests. Facing the requirement to show an injury which gives them standing, appellants contend, in the final analysis, that they are "victims" of racial

integration. Appellants ask this Court to interfere in state political processes in order to impose a unique burden on African Americans seeking equality of political opportunity. Under appellants' reasoning, African Americans may seek to vindicate their right to equality of political opportunity only through the creation of *regularly-shaped* majority-black districts, while white people, Republicans, supporters of incumbent office holders -- or any other politically distinct portion of the larger community -- may seek political advantage in the redistricting process by other means, including the creation of irregular districts which, as this Court has repeatedly noted, have been a feature of American political geography time out of mind. Appellants' argument falls afoul of the principle this Court recognized in *Hunter v. Erickson*, 393 U.S. 385 (1969): the Fourteenth Amendment prohibits the government from imposing procedural or substantive barriers to the pursuit of racial equality that are not raised against other objectives in the political process. Appellants claim to be vindicating interests secured by the Equal Protection Clause. But the relief they seek protects no individual right. Instead, it interferes in the political processes of reapportionment protected by our federalism only to deny African Americans an equal ability to participate in democratic self-government.

ARGUMENT

I. Majority-Black Districts May Be Narrowly Tailored Without Being Geographically Compact

Appellants' arguments about district compactness commit a fundamental error of double counting. They assume not only that shape is evidence of a racial motivation, but also that the Constitution somehow imposes an independent compactness requirement on race-conscious districts. That assumption misunderstands this Court's analysis in *Shaw v. Reno*, 113 S.Ct. 2816 (1993) ("*Shaw I*"), and *Miller v. Johnson*, 115 S.Ct. 2475 (1995). It also flouts an unbroken line of precedent according states substantial leeway in developing plans that comply with constitutional and statutory commands such as one-person, one-vote or section 2 of the Voting Rights Act of 1965. The "complex process" of "reconcil[ing] the competing claims of political, religious, ethnic, racial, occupational, and socioeconomic groups," *Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in the judgment), requires states to make tradeoffs among various districting theories and principles. This Court and other courts have consistently permitted states to subordinate aesthetic regularity of boundaries to other state concerns such as political fairness, protection of incumbents, and recognition of identifiable communities of interest. Put simply, if states are permitted to remedy Voting Rights Act violations by drawing noncompact majority-black districts -- and they are -- then North Carolina was entitled to draw the Twelfth Congressional District as part of its legitimate effort to comply with section 2.

A. *Shaw I* and *Miller* Identify a Narrow Role for Evidence Regarding the Shape of Challenged Districts

Geographic compactness plays only a limited role in cases challenging a state's reliance on race in its reapportionment process. *Shaw I* reiterated that compactness, contiguity, and respect for political subdivisions are *not*

constitutionally required. 113 S.Ct. at 2827; *see also Gaffney v. Cummings*, 412 U.S. 735 (1973). Rather, as *Miller v. Johnson* explained, district shape is merely one evidentiary tool for discerning the purpose underlying a reapportionment plan. 115 S.Ct. at 2486-87.

If a reviewing court concludes that race served as "the predominant, overriding factor" in the redistricting process, then the state "must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Id.* at 2490. But this narrow tailoring requirement goes solely to the behavior that raises constitutional misgivings: the use of race. In reviewing a state's apportionment choices, the courts "should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'" *White v. Weiser*, 412 U.S. 783, 795 (1973) (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)). Thus, if a state has a compelling reason for drawing a majority-black district, federal courts should override the state's choice about which district to draw, and where, only if that choice independently poses constitutional or statutory problems. For example, a reviewing court could properly reject a race-driven plan that contained unnecessary deviations from population equality in violation of *Karcher v. Daggett*, 462 U.S. 725 (1983), or a plan that would consistently degrade the influence of a politically defined group of voters in violation of *Davis v. Bandemer*, 478 U.S. 109 (1986). But strict scrutiny provides no warrant for imposing constraints unrelated to pre-existing constitutional duties. *Cf. Missouri v. Jenkins*, 115 S.Ct. 2038, 2048-49 (1995).[1] Thus, for example, if a federal court were to conclude that a county commission district in the western part of a county failed strict scrutiny, this would provide no warrant for the court to require the county to redraw districts in the eastern part of the county to achieve a 3 percent rather than a 5 percent deviation.

So, too, with compactness. This Court has consistently approved of jurisdictions' remedial proposals even when more compact and "traditional" alternatives were available because it has recognized that the less compact or more novel plans may better accommodate the many competing concerns states have in the redistricting process. As *Upham v. Seamon*, 456 U.S. 37, 43 (1982) (per curiam), explained, federal courts must "reconcile the requirements of the Constitution with the goals of state political policy"; "an appropriate reconciliation of these two goals can only be achieved if the District Court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect."

White v. Weiser, 412 U.S. 783 (1973), provides a particularly salient example of this general principle. There, the plaintiffs showed that the state's legislative districts violated one-person, one-vote. The plaintiffs' proposed remedy was more compact and contiguous than the jurisdiction's. *See id.* at 794. Nonetheless, this

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[1] In *Jenkins*, this Court held that a federal court's remedial authority over a racially discriminatory school system is limited to curing those effects that are the direct vestiges of prior *de jure* segregation. This remedial authority does not extend to ordering the jurisdiction to adopt desirable programs or policies beyond those necessary to cure the violation.

Court held that the state's policy goals, including its desire to protect incumbents, were entitled to substantial deference: "[R]eapportionment is a complicated process. Districting inevitably has sharp political impact and inevitably political decisions must be made." *Id.* at 795-96. Thus, the Court concluded that compactness and other traditional districting principles "do not override" the legislature's policy choices. *Id.* at 796.

The same reasoning applies in *Shaw-Miller* cases. Excess reliance on race, not boundary irregularity, is the relevant injury. Thus, states remain free to choose whatever boundaries they think fit, so long as they do not impermissibly elevate the creation of majority one-race districts over other considerations.

B. Section 2 Provides a Compelling State Interest for Certain Race-Conscious Districting, But Does Not Require States To Draw Compact Districts

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, provides a compelling interest for deliberately drawing majority-black districts. As this Court recognized in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and *Johnson v. DeGrandy*, 114 S. Ct. 2647, 2661 (1994), "society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity." As *Gingles* explained, "[t]he essence of a § 2 claim is that a certain electoral law ... interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." 478 U.S. at 47. Thus, section 2

remedies respond, not only to past discrimination, but to the *present-day effects* of prior disenfranchisement and dilution. *See id.* at 44 n. 9 (citing S. Rep. No. 97-417, p. 40 (1982)). The state clearly has a compelling interest in remedying the ongoing effects of its prior deliberate disenfranchisement and dilution.

Of course, section 2 does not require maximization of minority political strength. *See DeGrandy*, 114 S.Ct. at 2659; *cf. Miller*, 115 S.Ct. at 2491. But it does require that minority voters be given an equal opportunity, as well as an equal obligation, to "pull, haul, and trade to find common political ground" in the redistricting process. *DeGrandy*, 114 S.Ct. at 2661. For the reasons we explain in Part III of this brief, requiring racial minorities, but no other group, to seek only compact districts raises practical, and constitutional, concerns. Here, however, we focus on the very limited role compactness plays at the liability and remedy phases of section 2 litigation.

Section 2 requires plaintiffs to show as a threshold prerequisite to establishing liability that the minority group of which they are members is "sufficiently large and geographically compact to constitute a majority in a single-member district," *Gingles*, 478 U.S. at 50; *see also Growe v. Emison*, 113 S.Ct. 1075, 1084 (1993); *DeGrandy*, 114 S.Ct. at 2654-55. But these districts are merely "illustrative"; their admission at the liability phase of a section 2 proceeding says absolutely nothing about whether the defendant jurisdiction must adopt them as a remedy. *See, e.g., Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022, 1054 (D. Md. 1994) (three-judge court); *Jeffers v. Clinton*, 730 F. Supp. 196,

206 n.7 (E.D. Ark. 1989) (three-judge court); *compare, e.g., Ward v. Columbus County, North Carolina*, No. 90-20-CIV-7-BR, slip op. at 20 (E.D. N.C. Dec. 17, 1991) (describing two plans presented by plaintiffs at the liability phase having either one or two majority black districts out of five) *with Ward v. Columbus County, North Carolina*, No. 90-20-CIV-7-BR, slip op. at 3 & 11 (E.D.N.C. Apr. 15, 1992) (approving a plan which, at the jurisdiction's instance, increased the size of the governing body from five to seven and was developed entirely during the remedy proceedings).

Once liability has been found, however, geographic compactness normally drops out of the picture, except to the extent that the plaintiffs argue that the defendant could have drawn additional compact majority-black districts. With respect to the configuration of a new plan, courts must defer to the jurisdiction's choice among possible remedies as long as the jurisdiction presents a proposal that "completely remedies the prior dilution ... and fully provides equal opportunity," S. Rep. No. 94-417, p. 31 (1982). As this Court has repeatedly emphasized, "a State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause." *Burns v. Richardson*, 384 U.S. 73, 85 (1966); *see also, e.g., McDaniel v. Sanchez*, 452 U.S. 130, 150 (1981); *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). Since the Constitution concededly does not demand compactness or regularity of shape, *see, e.g., Shaw I*, 113 S.Ct. at 2827; *Davis v. Bandemer*, 478 U.S. 109; *Badham v. Eu*, 488 U.S. 1024 (1988), *summarily aff'g*, 694 F. Supp. 664 (N.D. Cal.) (three-judge court), states are not required to

draw compact districts in order to remedy a proved section 2 violation.

Perhaps the clearest illustration of this principle came in the remedial proceedings in *Gingles* itself. The district court approved the defendant's remedial districts for Mecklenburg County despite the fact that the plaintiffs' proposed remedy "contain[ed] districts which, on the whole, are significantly more regular in shape than are their counterparts in the state's plan." *Gingles v. Edmisten*, 590 F. Supp. 345, 380 (E.D.N.C. 1984), *aff'd in part, rev'd in part on other grounds*, 478 U.S. 30 (1986). The three-judge court "assume[d], as plaintiffs suggest, that the state's plan reflects a primary concern to protect incumbents that prevailed over any concern to ... insure compactness and cohesion in drawing district lines," but nonetheless adopted the plan because it could not conclude that "the challenged portions of the state's plan ... so seriously and demonstrably impinge upon the voting strength of the residual aggregations of black voters in the affected areas that the plan violates anew the voting rights of those persons." *Id.* at 382.

Since *Gingles*, many other district courts have approved remedies that sacrificed traditional principles such as compactness and contiguity to competing state interests. A few examples will suffice. In *Dillard v. Town of Louisville*, 730 F. Supp. 1546 (M.D. Ala. 1990), for example, the district court approved a defendant's proposed section 2 remedy that involved a non-contiguous district, despite the availability of a multi-member district plan that was both compact and contiguous and completely cured the section 2 violation:

> "Louisville designed the plan at issue, and the town apparently believes that the plan, despite its non-contiguousness, accommodates a sense of community within each district. The town's familiarity with its own practical needs warrants substantial deference from the court."

Id. at 1549. *See also, e.g., Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1072, 1074 n.1, 1076 (D. Md. 1994) (three-judge court) (approving the state's remedy proposal -- a "variant" of one of the plaintiffs' proposed districts -- even though it involved a total deviation of 14.8 percent because that plan best accommodated the dual goals of avoiding dilution and protecting incumbents); *Jeffers v. Clinton*, 756 F. Supp. 1195, 1200 (E.D. Ark. 1990) (approving a state-crafted senatorial district over the plaintiffs' objections and their proposed district), *aff'd*, 498 U.S. 1019 (1991). What each of these district courts has recognized is that the "intensely local appraisal of the design and impact" of electoral mechanisms that informs section 2, *Gingles*, 478 U.S. at 79 (internal quotation marks and citations omitted), extends to the remedial stage, and that as long as no voter has his vote denied or diluted, the political branches are better equipped than the judiciary to decide how to balance competing concerns.

There is sound justification for this longstanding remedial practice. *Cook v. Luckett*, 735 F.2d 912 (5th Cir. 1984), a case involving claims of both malapportionment and racial vote dilution, offers perhaps the most detailed analysis. There, the court of appeals reversed the district court's adoption of a plan proposed by private plaintiffs over a plan proposed by the county (and

supported by the NAACP). The county wanted to keep the cores of old districts in creating its new ones and this

> le[ft] district one bizarrely shaped: its western and most of its eastern sections were unchanged, but they were joined by only a narrow corridor that meandered through Canton, at times only a block or two wide. Similar corridors were used to distribute southern Madison County's urban population among districts two and four.

Id. at 915. By contrast, the plaintiffs' plan

> described district lines along much more discernable boundaries than those proposed by the county and created districts shaped much more comprehensibly than the county's 'dumbbell' district one or its extremely narrow district four corridor.

Id. at 916. The district court rejected the county plan because the districts were "contorted" and "fail[ed] on their face to take communities of interest into account." *Id.* But the court of appeals reversed:

> We agree that the county's proposed district lines were more than just odd. Indeed, they seem to us, as they did to the court below, to respond poorly to commonly understood policies that govern apportionment planning. But after Upham [v. Seamon], questions of policy are reserved for legislative resolution. The district court was authorized to alter the county's legislative plan only in those ways necessary to

> remedy a constitutional or statutory vice. Because this record does not support the conclusion that the districts were constitutionally flawed by their bizarre shapes, we hold that the district court erred in rejecting the County Plan on this basis.

Id. at 920. "Apportionments that work no selective disenfranchisement but are merely unwise do not violate the equal protection standards that have developed since Reynolds v. Sims, and their perceived lack of wisdom is not to be corrected in the federal courts." *Id.* at 921. As the court of appeals recognized:

> While the maps depicting its result may seem odd, Madison County's political process involved just the sort of give-and-take between citizens and their elected officials that federal courts are unable to achieve. Unless a showing is made to render that give-and-take somehow suspect, we must acknowledge that process as the proper means toward the essentially political end of reapportionment. As Judge Wisdom has written, "the least representative branch of the government must take care when it reforms the most representative branch."

Id. at 918-19 (quoting *Marshall v. Edwards*, 582 F.2d 927, 934 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979)).

Thus, had North Carolina waited for minority plaintiffs to bring, and win, a section 2 lawsuit before drawing two majority-black districts, it would have been

free to accommodate competing state concerns by crafting irregularly shaped districts. Appellants provide no reason why the state should be more circumscribed in drawing districts to comply with its section 2 obligation prior to suit than afterwards.

Contrary to appellants' contention, there would have been no requirement that the state draw such districts in some particular part of the state. When plaintiffs challenge a statewide apportionment -- as opposed to challenging only a few districts in a particular part of the state, *see DeGrandy*, 114 S.Ct. at 2662 -- the dilution is measured on a statewide basis. *See, e.g., Davis v. Bandemer*, 478 U.S. at 133 (plurality opinion); *id.* at 153 (O'Connor, J., concurring in the judgment); *cf. United Jewish Organizations v. Carey*, 430 U.S. 144, 163-64 (1977) (plurality opinion) (deciding that a countywide dilution claim on behalf of white voters was foreclosed by the fact that the proportion of majority-nonwhite districts was less than the minority proportion of the population). In this case, the district court found that the state drew the two majority-black districts in areas of the state where black citizens' voting strength had been diluted. *See Shaw v. Hunt*, 861 F. Supp. 408, 472 (E.D.N.C. 1994) ("*Shaw II*"). Thus, black voters who were placed with the Twelfth District might well have been successful plaintiffs in a section 2 lawsuit had the state failed to draw any majority-black districts.

Often, there will be many ways of configuring districts to avoid racial vote dilution; in this case, the district court identified "[n]umerous" such plans. *Shaw II*, 861 F. Supp. at 463-64. Virtually all such choices will leave *some* nonwhite voters in majority-white

districts. *See, e.g., Gomez v. City of Watsonville*, 863 F.2d 1407, 1414 (9th Cir. 1988), *cert denied*, 489 U.S. 1080 (1989); *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989); *Gingles v. Edmisten*, 590 F. Supp. at 357-59; *Ward v. Columbus County, North Carolina*, No. 90-20-CIV-7-BR (E.D.N.C. Apr. 15, 1992). But the assignment of many black voters to majority-white districts neither renders the remedy incomplete nor creates a new violation of the Voting Rights Act. Indeed, it tends to negate claims that the districts "segregate" voters or resemble "political apartheid," *Shaw I*, 113 S.Ct. at 2824, 2827. The upshot of a plan such as North Carolina's here -- in which a large proportion of the state's black voters live in majority-white districts -- is to retain racially integrated legislative districts while also producing a racially integrated congressional *delegation*.

But just as black voters who remain in majority-white districts suffer no cognizable injury so long as black voting strength is not diluted, so too white voters who are placed within districts necessary to comply with section 2 have suffered no cognizable injury. As long as states engage in geographic districting, and as long as they choose to draw competitive rather than homogeneous districts, *some* voters will live in districts in which they are members of the numerical minority. In general, this Court has seen these voters as being adequately represented. *See Davis v. Bandemer*, 478 U.S. at 132 (plurality opinion); *see also Thornburg v. Gingles*, 478 U.S. at 99 (O'Connor, J., concurring in the judgment). Absent the kind of special representational harm discussed in Part II or some other constitutional infirmity, voters placed in section 2 compliance districts where they are part of the

racial minority cannot challenge the state's configuration of those districts.

C. A District's Irregular Shape May In Fact Provide Evidence That Race Was *Not* the Predominant Factor in its Creation

Appellants' arguments also ignore a simple fact of apportionment mathematics: the more values that "enter into a legislature's redistricting calculus," *Miller*, 115 S.Ct. at 2488, the fewer the possible solutions. From among the essentially infinite universe of possible plans, one-person, one-vote eliminates some substantial number: only those plans with equipopulous districts will pass constitutional muster. Each additional constraint -- whether protection of incumbents, capture of partisan advantage, compliance with nonretrogression, or recognition of communities of interest (be they racial, economic, occupational, or residential) -- eliminates some of the remaining possible districting schemes. Inevitably, states must make tradeoffs.

Paradoxically, if creating majority-black districts is the state's predominant concern, it becomes far easier to craft regularly shaped districts than if other concerns -- like the safeguarding of incumbency and partisan advantage or the concern with reflecting distinctively rural or urban interests that drove the North Carolina process -- predominate. If majority-black districts are drawn first, such districts may actually be *more* regular than comparable majority-white districts. This point is clearly illustrated by the California plan this Court summarily approved last Term in *DeWitt v. Wilson*, 115 S.Ct. 2637 (1995). As the Special Masters who drew the plan

explained, "[h]aving *first* constructed Latino and African-American congressional and state legislative districts ... the *remainder* of the districts allocated to Los Angeles County had to be constructed around the periphery; in some instances *they* became rather elongated. *See Wilson v. Eu*, 823 P.2d 545, 579-80 (Cal. 1992) (emphasis added).

Ironically, the irregularity of a district's shape may in fact be powerful evidence that racial considerations, while undoubtedly present, did *not* predominate and instead were part of a complex calculus. Three criteria omitted from *Miller*'s list of "traditional" districting principles -- equipopulousity, partisan advantage, and incumbent protection -- are virtually sure to loom larger in the legislature's redistricting calculus and may produce irregular majority-black districts. In Texas, for example, the legislature declined to draw an extremely compact majority-black district in Dallas because two white, incumbent Democrats each wanted to keep substantial numbers of reliably Democratic black voters in their districts. *See Vera v. Richards*, 861 F. Supp. 1304, 1321, 1338 (S.D. Tex. 1994) (three-judge court), *probable juris. noted*, 63 U.S.L.W. 3917 (June 29, 1995). The shape of the newly created majority-black district -- which was essentially slipped into territory grudgingly ceded by the two white incumbents, and which had to reach out tentacles to incorporate pockets of white (not black) voters necessary to reach the ideal district population -- reflects not the dominance but the secondary consideration of the black community's interest. *See also Miller*, 115 S.Ct. at 2503-04 (Ginsburg, J., dissenting) (describing various political considerations that explain parts of the Eleventh District's shape).

In this case, the shape of the Twelfth District reflects this very dynamic. The district court found that the General Assembly was "specifically aware" of "[n]umerous plans" that "demonstrated that the state's African-American population was sufficiently large and geographically compact to constitute a majority in two congressional districts." *Shaw II*, 861 F. Supp. at 463. Had the state's sole concern been with creating a majority-black district, it could have drawn one with a considerably more regular shape. *See id.* at 463-64. But various incumbency and partisan interests, as well as the desire to draw an urban district, outweighed aesthetic concerns. *See id.* at 465, 468, 469. The district court's findings were entirely justified by the record, and appellants do not seriously argue that they were clearly erroneous.

For the reasons advanced by the Gingles appellees, we believe that these factual findings should defeat appellants' invocation of strict scrutiny: the facts show that race was just one among many factors taken into account in crafting the North Carolina congressional map. But even if strict scrutiny is warranted, the state should remain free to satisfy its compelling interest in adherence to section 2 of the Voting Rights Act by crafting non-compact districts.

II. Federal Courts Should Overturn a Reapportionment Plan Only When Plaintiffs Prove the Special Representational Harms Identified in *Shaw I*

As we explained in Part I, federal courts should act with great circumspection in overturning the results of the intensely political redistricting process. Concerns for state political autonomy require that courts intervene on

behalf of individuals whose votes have been neither denied nor diluted only when they plead *and prove* the special representational harms identified in *Shaw I*. Otherwise, the Court will permit lawsuits based on a "generalized grievance against governmental conduct," *United States v. Hays*, 115 S.Ct. 2431, 2436 (1995), simply because of the fortuity that the individual with that generalized grievance happens to live in a majority-black legislative district.

To understand why this is so requires considering the relationship among the three "irreducible" elements of standing: an "injury in fact"; "a causal connection between the injury and the conduct complained of"; and the likelihood that the injury "will be redressed by a favorable decision." *Hays*, 115 S.Ct. at 2435; *see also, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Allen v. Wright*, 468 U.S. 737, 751 (1984). First, appellants Shaw and Shimm -- the only plaintiffs with even a semblance of standing[2] -- have never shown that "they, *personally*, have been subjected to a racial classification." *Hays*, 115 S.Ct. at 2433 (emphasis added). In fact, they were placed in the Twelfth District

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[2]It seems entirely to have escaped appellants' notice that, in light of this Court's decisions in *United States v. Hays* and *Miller v. Johnson*, none of the seventeen appellants has standing to challenge the state's decision to draw a majority-black First Congressional District -- since none of them lives anywhere near that district -- and that three of the Shaw appellants and *all* of the Pope appellants lack standing altogether. *See Shaw I*, 113 S.Ct. at 2821 (two of original appellants live in the Twelfth District and three live in the Second District). This utter lack of standing justifies, by itself, affirmance of the district court's judgment with respect to the First District.

primarily in order to create a district whose total population satisfied the one-person, one-vote requirement of the Fourteenth Amendment and whose residents shared relevant economic and nonracial demographic characteristics. Once the General Assembly had crafted a district that provided black voters with an equal opportunity to elect the candidate of their choice, it was entirely indifferent as to the race of the other voters whose residences placed them within the district. In doctrinal terms, Shaw and Shimm were, if anything, put in the district "in spite of," and not "because of," their race. *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979).

Shaw and Shimm's real claim rests instead on the assertion that the state's deliberate placement of *black* voters within the district in which they live has somehow adversely affected them, since had they lived in an identically shaped district that was 55 percent white, they would have had no constitutional peg on which to hang their grievances. Without proof of a representational injury, however, this claim looks perilously close to an assertion that the plaintiffs have been injured by racial integration -- or at least racial integration in which whites do not remain the predominant group. Nothing in this Court's opinions suggests that racial integration gives rise to a cognizable injury on the part of individuals placed in a majority other-race setting.

In any event, appellants' injury in fact must consist of more than simply being classified on the basis of race, since the government constantly *classifies* individuals on the basis of race. *See, e.g.*, Jury Selection Act of 1968, 28 U.S.C. § 1869(h) (1988) (requiring that juror qualification forms "elicit" a juror's race); Office of Manage-

ment and Budget, Statistical Policy Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting (1977) (providing for the pervasive collection and use of data involving racial classifications). No court has ever required a heightened justification for using race in this fashion. The danger arises not from the government's awareness of race, *cf. Shaw I*, 113 S.Ct. at 2826, or even its *use* of race -- indeed, but for the census' dissemination of race-based data, it would be impossible for appellants or this Court to know the racial composition of the challenged districts -- but from its use of race as a criterion for allocating benefits and burdens among citizens. That is why *Feeney* requires that a plaintiff show that the government adopted or maintained the challenged practice "at least in part 'because of,' not merely 'in spite of,' *its adverse effects* upon an identifiable group." 442 U.S. at 279 (emphasis added).

The analysis in *United States v. Hays*, 115 S.Ct. 2431, rests on this understanding. There, the Court premised its holding that residents of a legislative district have standing to challenge the deliberate use of race in drawing the district on "the special representational harms racial classifications can cause in the voting context." *United States v. Hays*, 115 S.Ct. at 2436. Absent these representational harms, or any denial or dilution of the right to vote, an individual's challenge to a legislative reapportionment scheme reflects "only a generalized grievance against governmental conduct of which he or she does not approve." *Id.* Moreover, as long as the government is entitled to take race into account -- and *Miller* and *Shaw I* permit deliberately using race "when members of a racial group live together in one community" and share "some common thread of relevant interests," 115 S.Ct. at 2490; 113 S.Ct. at 2826 -- plaintiffs such as Shaw and Shimm cannot show redressability, since even if the particular plan before the court is struck down, they may nonetheless be subjected to race-conscious districting.

In this case, the district court found *no* representational harms. It specifically "discount[ed]" appellants' claim that the Representative from the Twelfth District failed to consider their needs. *Shaw II*, 861 F. Supp. 472 n. 59. It characterized their self-described injuries as "abstract, theoretical, and merely speculative, not concrete and palpable." *Id.* at 424. And it found that challenged districts were

> based on rational districting principles that ensure fair and effective representation to all citizens covered by them, since they are deliberate designed to be and are in fact highly homogeneous in terms of their citizens' material conditions and interests, and do not significantly inhibit access to and responsiveness of their elected representatives.

Id. at 475. Under these circumstances, Shaw and Shimm -- like the other appellants -- have suffered no personal, concrete injury that justifies enabling them to enlist the federal courts in overturning North Carolina's considered judgment that the its plan best accommodates the competing interests at play in the reapportionment process.

III. Requiring States To Maximize the Compactness of Majority-Black Districts Poses Serious Pragmatic and Constitutional Dangers

To require states that seek to meet their affirmative obligation under the Voting Rights Act to ensure equal political and electoral opportunity[3] also to achieve the greatest possible regularity of shape for majority-black legislative districts will be both counterproductive and, ultimately, constitutionally problematic.

First, if only the most regularly shaped district can pass muster, then "narrow tailoring" paradoxically *forces* states to treat race as a "predominant," "overriding" factor, since it demands that the state draw aesthetically regular majority-black districts even if this means "subordinating" other concerns such as protection of incumbents, partisan allocation of seats, and recognition of other cognizable communities of interest. In other words, it is the requirement that majority-black district be regularly shaped, and not the intentional drawing of such districts, that sacrifices other interests to race. And the requirement that minority districts be drawn first, rather than as part of the overall apportionment process, obviously poses dangers of exacerbating racial polarization in the political process.

Second, if the state can recognize the claims of

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[3] *Cf.* 42 U.S.C. § 1973b(a)(1)(F) (1988) (requiring covered jurisdictions that seek to bail out from the preclearance requirement to "eliminate voting procedures or methods of election which ... dilute equal access" and to "engag[e] in other constructive efforts").

minority voters only by sacrificing the claims of other groups, the legislature is far less likely to recognize black voters' claims in the political redistricting process. Thus, requiring regularity may lead states to sacrifice minority political interests that they would otherwise be willing to recognize because it will hamstring states from satisfying both minority concerns and other interests. This means that minority voters will be less likely to achieve their goals through the "pull[ing], haul[ing], and trad[ing]" process celebrated by *DeGrandy*, and more likely to have to seek creation of equal opportunity districts through the litigation process or through appeals to the Department of Justice during the preclearance process, with the attendant problems of federal intervention in this essentially local political activity. And even once litigation ensues, forcing defendants to draw aesthetically pleasing districts may hinder the settlement process, in which plaintiffs and jurisdictions might otherwise craft innovative remedies that better accommodate all their competing interests. *See, e.g., Town of Louisville*, 730 F. Supp. 1546 (approving a consensual noncontiguous district plan); *Montgomery County Branch of the NAACP v. Montgomery County, North Carolina*, No. C-90-27-R (M.D.N.C. Jan. 23, 1990) (approving a consensual plan using a multimember district and candidacy restrictions).

Third, to require greater regularity for majority-black districts than for other districts would itself raise constitutional problems. In *Hunter v. Erickson*, 393 U.S. 385 (1969), this Court struck down a provision of the Akron City Charter that made it more difficult to obtain anti-discrimination legislation than other forms of legislation. The Court explained that "the State may no more disadvantage any particular group by making it more difficult

to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.* at 393.

Requiring members of racial minorities, but not other groups, to seek only districts with a regular configuration would be equally unconstitutional. Such a requirement would clearly run afoul of *Hunter*, because it would treat voters who politically affiliate along racial lines differently from voters who choose to affiliate along other shared characteristics, and would make it more difficult for them to secure favorable apportionment plans. As we have already explained, such a stricture would make it more difficult for black voters than for other groups to enact favorable apportionment legislation, since it would constrain their available options in ways that other groups' options were not constrained.[4] To require districts sought by the black community to be more regular than districts obtained by other identifiable groups would turn the Fourteenth Amendment on its head, making the Amendment's original intended beneficiaries -- black Americans -- the only group whose political aspirations are stringently limited by considerations of compactness and regularity of district boundaries. For federal courts to impose such a policy runs afoul of the equal protection component of the Due Process Clause of the Fifth Amendment.

As *Shaw I* recognized, all legislators are inevitably *aware* of the racial and demographic composition of the

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[4]Surely a statute that provided that "a majority-white district may be any shape but a majority-black district must be regular in its boundaries" would be unconstitutional.

constituency they represent. 113 S.Ct. at 2826. This will be true whatever the configuration of their district. Thus, to the extent that the racial composition of a district signals to its representative how he should approach his task, "[t]he message will be the same regardless of the shape of the envelope in which it is sent." Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 Sup. Ct. Rev. 345, 381. To suggest that representatives from majority-black districts do not represent all their constituents as fairly as representatives from majority-white districts do is precisely the kind of offensive stereotype the Fourteenth Amendment condemns. *See Miller*, 113 S.Ct. at 2486. But to say that appellants Shimm and Shaw have suffered a "representational injury" simply by virtue of being placed in a majority-black district rests, at bottom, on precisely this noxious reasoning. How, precisely, are they less well represented? They have provided no evidence to show that their congressman fails to provide constituent services on a nondiscriminatory basis; indeed, there is none. And to the extent that Representative Watt or other black legislators bring to legislative deliberations distinctive "qualities of human nature and varieties of human experience," *Taylor v. Louisiana*, 419 U.S. 522, 532 n.12 (1975), that stem from their status as African Americans, what appellants really are claiming is that somehow they are injured when these previously excluded voices are added to the chorus. This Court should see appellants' "invocation of the ideal of a 'color-blind' Constitution," *Shaw I*, 113 S.Ct. at 2824, for what it really is: an argument that they are somehow denied their legitimate expectations by being forced into a district in which black voters as well as white enjoy an equal opportunity to participate in the political process and elect

candidates of their choice. All North Carolinians, including appellants, are in fact better served by the outcome of the most recent reapportionment, since its results are more truly representative than any in the past century.

CONCLUSION

Amici urge this Court to affirm the judgment of the United States District Court for the Eastern District of North Carolina.

Respectfully submitted,

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INTERESTS OF AMICUS CURIAE

The Congressional Black Caucus (the "Caucus") is composed of 40 African Americans who have been elected to the United States House of Representatives and Senate. Thirty-six of the 40 members were elected from majority-minority districts. The determination regarding the constitutionality of North Carolina's redistricting legislation is one that will affect not only the two Caucus members from North Carolina, but also other Caucus members and millions of African Americans who reside in majority–minority districts.

ARGUMENT

I.

SUMMARY OF ARGUMENT

The Caucus believes that majority–minority districts are an indispensable means of advancing America from a political tradition of exclusion based on race, to a political future of full inclusion. The general purpose of all districting is to permit the representation of numerical minorities whose votes otherwise would be submerged by those of the majority. In the context of racial minorities, majority–minority districts operate to ensure that their votes are not consistently submerged.

Majority–minority districts also further the pluralist aspirations of our American democracy. These districts have enabled racial minorities, for the first time in some instances, to elect the candidates of their choice. This increased diversity within Congress legitimizes congressional discourse and legislation.

This Court's decisions in *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993) and *Miller* v. *Johnson*, 115 S. Ct. 2475 (1995), articulate the standard of review for race–conscious districting. Although redistricting decisions always have included consideration of racial demographics, this Court has decided that where race is the "predominant" factor motivating redistricting legislation that legislation should be evaluated under the most exacting standard of

constitutional review. *See Miller*, 115 S. Ct. at 2482-83; *Shaw*, 113 S. Ct. at 2824. This Court further notes that a redistricting plan is *not* narrowly tailored if it goes "beyond what is reasonably necessary" to further a compelling interest. *See Shaw*, 113 S. Ct. at 2831. The Caucus maintains that the North Carolina redistricting legislation was narrowly tailored to serve the state's compelling interest in remedying the effects of North Carolina's history of racial discrimination and political exclusion.[1/]

The State of North Carolina has a long, ugly history of racial discrimination and political exclusion. In the context of congressional elections, prior to the challenged 1992 redistricting legislation, African Americans in North Carolina had essentially been shut out of the political process for almost one hundred years. North Carolina used a variety of *de jure* methods—*e.g.*, literacy tests and poll taxes—to prevent African Americans from electing the candidates of their choice. In addition, *within the last ten years*, political parties and candidates in North Carolina have engaged in fraudulent schemes to intimidate African-American voters and have used race-baiting campaign tactics. As set forth below, North Carolina had a compelling governmental interest in enacting districting legislation that remedies the substantial effects of its past racist policies and present practices.

Moreover, race-conscious districting has not resulted in the harms this Court predicted. Representatives from majority-minority districts fairly and conscientiously represent the interests of their constituents—regardless of race. Further, the fact that the challenged districts were created, in part, to give political voice and electoral power to African-American communities of interest is not demeaning. Rather, the creation of these districts represents recognition of the bonds that often form among those with a common racial heritage and a shared experience of past and present racial discrimination.

1/ The Caucus also joins appellees' argument that the lower court incorrectly found that race was the predominant factor in the drawing of the challenged districts.

II.

MAJORITY-MINORITY DISTRICTS ARE A CRITICAL TOOL FOR ACHIEVING A TRULY REPRESENTATIVE POLITICAL SYSTEM

The redistricting processes that took place across the country after the 1990 Census led to significant gains in the number of minority congressional representatives. As a result, Congress is more racially diverse today than ever in our Nation's history. Currently, there are 40 African Americans in Congress, 17 Hispanic Americans, 5 Asian Americans and 1 Native American.[2/] The current diversity in Congress is, in large part, due to the creation of majority-minority districts.

Prior to Reconstruction and the passage of the Fourteenth and Fifteenth Amendments to the Constitution, no African American served in Congress. From 1901 to 1928, there were no African Americans in Congress; from 1929 to 1944, there was but one.[3/] And, the voice of that lone Negro, Congressman Arthur Mitchell, was all but drowned out by the antagonistic posturing of his white colleagues.[4/] From 1945 to 1955 there were only two

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2/ *See* David A. Bositis, African Americans and the 1994 Midterms: What Happened? (1994) [hereinafter Bositis, The 1994 Midterms].

3/ For a list of African Americans who have served in Congress *see* Appendix A hereto.

4/ During the 1936 Democratic convention, for example, Congressman Mitchell's own party rejected his participation in the electoral process: "Congressman Mitchell's presence on the podium . . . was used as an excuse for a U.S. Senator from South Carolina and eight other delegates to stage a walkout in protest." William L. Clay, *Just Permanent Interests: Black Americans in Congress: 1870-1991* at 72 (1992). In addition to slights inflicted by his political colleagues, Congressman Mitchell suffered indignities in a variety of contexts. For example, Congressman Mitchell was forced to ride in the coach car during a train ride to Arkansas, despite

(continued...)

African Americans. Regardless of the levels of charisma and capabilities possessed by these two representatives, their number prevented them from moving their colleagues to adopt and embrace an agenda of full inclusion. In 1957, when the number of African Americans in Congress doubled, to four, America was still far from a representative democracy.

Our country took a giant leap toward achieving its pluralist ideals, with enactment of the Voting Rights Act of 1965,[2] which paved the way for increasing numbers of African Americans to gain access to polling booths, state legislatures and the United States Congress. By the 1980's there were approximately twenty African Americans in Congress and a significant increase occurred after the elections of 1992, which brought the tally of Caucus members to 40.

North Carolina's First and Twelfth Districts and other majority-minority districts have moved America toward the ideal of a representative democracy, one that encourages the inclusion of all Americans in political discourse and decision making.

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[2](...continued)
his possession of a first-class ticket. Congressman Mitchell later testified that after the conductor was informed that Mitchell was a Congressman, the conductor replied "it didn't make a damn bit of difference who I was, that as long as I was a nigger I couldn't ride in that car." Congressman Mitchell considered pressing the issue further, but, as he testified, "I thought maybe I had better not; being the only negro in Congress . . . I had better not get lynched on that trip." A. L. Higginbotham, Jr. & W. C. Smith, *The Hughes Court and the Beginning of the End of the "Separate But Equal" Doctrine*, 76 Minn. L. Rev. 1099, 1103 (1992) (quoting *Mitchell* v. *U.S. Commerce Comm's.*, 313 U.S. 80 (1941)).

[2] 42 U.S.C. § 1973 *et. seq.* (1988).

A. Religious, Racial, and Ethnic Groups Form the Building Blocks of Our Pluralist Democracy

As this Court has noted, all districting involves classifying voters into groups, including groups defined by race or ethnicity.[2] As Justice O'Connor has acknowledged, the reapportionment process has traditionally involved political accommodation of the "competing claims of political, religious, ethnic, racial, occupational and socioeconomic groups."[2] Yet,

> [u]ntil now, no constitutional infirmity has been seen in districting Irish or Italian voters together, for example, so long as the delineation does not abandon familiar apportionment practices. If Chinese-Americans and Russian-Americans may seek and secure group recognition in the delineation of voting districts, then African-Americans should not be dissimilarly treated. Otherwise, in the name of equal protection, we would shut out "the very minority group whose history gave birth to the Equal Protection Clause."

Miller, 115 S. Ct. at 2506 (Ginsburg, J., dissenting) (quoting *Shaw*, 113 S. Ct. at 2845 (Stevens, J., dissenting)). In the context of America's unique history, it is essential that this Court recognize that African Americans, like other racial and ethnic groups, often form communities with distinct political interests.

In *Shaw*, and again in *Miller*, this Court warned that districting that recognizes shared interests among African Americans "may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in

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[2] *See Shaw*, 113 S. Ct. 2816, 2826 (1993); *Miller*, 115 S. Ct. 2475, 2488 (1995).

[2] *Davis* v. *Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring).

which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Miller*, 115 S. Ct. at 2486; *see Shaw*, 113 S. Ct. at 2832. As the history of racial violence and segregation detailed in Part III, *infra*, demonstrates, North Carolina has been "balkanized," *i.e.*, divided into hostile groups, for over one hundred years. The 1992 redistricting legislation did not create or even exacerbate these racial divisions.

Rather, North Carolina's 1992 redistricting legislation empowered and enfranchised those who long have been excluded from North Carolina's political life. A large proportion of white voters in North Carolina are resistant to voting for African-American candidates or for any candidate who supports initiatives perceived to be favorable to African Americans.[9/] According to James M. O'Reilly, a political demographer involved in North Carolina politics for over 15 years, the possibility of an African-American candidate in North Carolina obtaining 30 or 40 percent of the white vote is remote in North Carolina, if not inconceivable.[9/] As support for their argument against race-conscious districting, appellants point to the ability of African Americans *in other states* to be elected in majority-white congressional districts and to the widespread popularity of General Colin Powell—a man for whom not one vote has been cast by anyone—as examples of why majority-minority districts are unnecessary. (App. Brief at 30 n.26). These examples, however, ignore the persistent inability of African Americans to be elected from majority-white districts in North Carolina.[10/] Far from

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[9/] Expert Witness Statement of James M. O'Reilly, at 2.

[9/] *Id.*

[10/] These examples also ignore the racism of North Carolina voters who have rejected even white candidates who support racial inclusion. *Cf. Thornburg* v. *Gingles*, 478 U.S. 30, 74-77 (noting that proof that some minority candidates have been successful does not foreclose a § 2 Voting (continued...)

balkanizing North Carolina, the challenged districts have created a North Carolina delegation that is better suited to represent North Carolina's racially diverse population.[11/] The newly-integrated North Carolina delegation also has created a more pluralistic Congress.

B. The Importance of Pluralism in American Government

A pluralist democracy is the antidote to the hostility associated with "balkanization," "segregation," and "political apartheid." Pluralism enables individuals from different backgrounds to learn of the experiences, concerns, and opinions of others. The sharing of life experience—which is the first step toward understanding—is indisputably necessary if our American democracy is to thrive. Pluralism does not mean, however, that only a person of one race will be able to legislate a matter fairly when her or his race is involved. Instead, pluralism guards against the influences of individual prejudice and further creates a milieu in which the entire congressional system benefits from the multi-faceted experiences of its members. In the context of the judiciary, Professor Charles Warren characterized the limitations of homogeneity in this way:

> The Court is not an organism dissociated from the conditions and history of the times in which it exists. It does not formulate and deliver its opinions in a legal vacuum. Its Judges are not abstract and impersonal oracles, but are men whose views are necessarily, though by no conscious intent, affected by inheritance, education and

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[10/](...continued)
Rights Act claim).

[11/] Approximately 20 percent of the voting-age population in North Carolina is African American.

environment and by the impact of history past and present.[12]

On a homogeneous court, no "outsider" challenges the biases the dominant group accepts as "self-evident" truths. As Justice Sandra Day O'Connor wrote of Justice Thurgood Marshall:

> At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.[13]

Justice O'Connor concluded that "outsiders'"stories "made clear what legal briefs often obscure: the impact of legal rules on human lives."[14]

Professor Warren's and Justice O'Connor's comments about the importance of pluralism apply equally to a legislature and its members. An unrepresentative legislature may articulate precepts or enact laws that seem appropriate to its members, who never imagine that their views may be nothing more than the "'prejudices' they 'share with [some of] their fellow-men.'"[15] The

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[12] 1 Charles Warren, *The Supreme Court in United States History* 2 (1926).

[13] Sandra D. O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217, 1217 (1992).

[14] *Id.*

[15] Oliver W. Holmes, *The Common Law* 1 (1881) ("[E]ven the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.").

American experience is replete with examples of such governmental biases.[16]

The benefits of a representative Congress are manifold. First, the decisions made by a representative Congress carry an air of legitimacy that is absent when decisions are made by a homogeneous body. The decision to commit forces to combat, for example, bears much less legitimacy when the legislative body acting in support of that decision does not well represent the soldiers sent to combat. During the 1991 Gulf War, Congress was faced with the decision whether to commit American forces—forces that are disproportionately black and poor—to combat. The congressional debate regarding the deployment of troops to Iraq was criticized as potentially illegitimate and unfair precisely because the composition of the Congress did not accurately reflect the composition of the community from which the soldiers sent into combat would come.[17]

Another example of the power of a pluralist legislature was recently demonstrated when the Senate Ethics Committee investigated Senator Packwood. The presence of women on the Ethics Committee and in the Senate forced the Senate to seriously address the misconduct of one of its own members. Such a searching inquiry would have been inconceivable even three years ago when there were only two women in the Senate.

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[16] *The Congressional Quarterly*, describing the passage of the 1965 Voting Rights Act, detailed twelve critical civil rights initiatives defeated in Congress—two anti-lynching statutes, five initiatives addressing poll taxes and literacy tests, three bills concerning fair employment practices, and two Civil Rights Acts. *See Cong. Q. Almanac* 551 (1965). Similarly, sexism influenced Congress and state legislatures, which in 1871 incorporated gender in the Fifteenth Amendment to ensure women did not gain suffrage. *See* Eleanor Flexner, *Century of Struggle*: The *Women's Rights Movement in the United States* 152 (rev. ed. 1975).

[17] *The Killing Fields Aren't Level*, N.Y. Times, Jan. 28, 1991, at A2.

In addition, a Congress comprised of representatives with varied backgrounds and experiences can bring their wealth of insight and perspective to bear on national issues that require innovative solutions. More often than not, congressional homogeneity and exclusivity are deterrents to rather than promoters of, innovation.

Finally, a pluralist Congress also ensures that issues of concern to African Americans and other racial minorities are consistently a part of the national agenda. For example, because of the influence of African-American voters in North Carolina's majority-minority districts, the representatives from these two districts can, in concert with other Caucus members, inform Congress of issues of special concern to all African-American North Carolinians.[18] As long as these districts remain majority-minority districts, it is likely that the interests of the numerous historically black colleges in North Carolina will be aggressively addressed; that redlining practices of banks affecting black neighborhoods will be closely scrutinized; and that cutbacks to social services will be challenged by representatives ready to dispute stereotypes of lazy black men and welfare mothers. Furthermore, unlike some of their predecessors who attempted to thwart the interests of African-American voters, these

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[18] In *Shaw* and *Miller*, the Court found the notion that individuals of the same race share political interests "demeaning." *Miller*, 115 S. Ct. 2475, 2486 (1995); *Shaw*, 113 S. Ct. 2816, 2827 (1993). And, indeed, it is true that the African-American community in North Carolina is diverse. For example, the interests of an African American who has been displaced due to the decline in agricultural jobs may differ from those of an African-American businesswoman who has been denied a loan by several banks. The North Carolina legislature, cognizant of that fact, created two majority-minority districts to reflect the different common interests of those in urban and rural settings. However, the fact remains that, with respect to some issues, an African-American farm worker and an African-American business person may have more in common with each other than with their white neighbors. Such an acknowledgment is not demeaning; it is realistic.

representatives can support civil rights initiatives without fear that taking a principled stand will end their political careers.

A Congress with members of all colors and both genders brings more American citizens into the political system, announces that government is for all Americans, increases the confidence of all American voters in the government and thereby cultivates political participation by all. Thus, the challenge in this and other voting rights cases is whether the significant racial pluralism finally occurring in the United States Congress will prevail—whether the voices and interests of minorities will be welcomed in the public debate—or will be silenced once more.

III.

THE HISTORY OF DISCRIMINATION IN NORTH CAROLINA JUSTIFIED THE CREATION OF TWO MAJORITY-MINORITY DISTRICTS

This Court held in *Miller* v. *Johnson*, that where race is the predominant factor motivating redistricting legislation such legislation is constitutional only if it is "narrowly tailored to further a compelling governmental interest."[19] The phrases "narrowly tailored," and "compelling governmental interest" are not self-defining. Accordingly, wise evaluation of majority-minority redistricting plans requires viewing them in proper historical perspective, applying the maxim of Justice Oliver Wendell Holmes: "a page of history is worth a volume of logic."[20] The political history in North Carolina is replete with examples of *de jure* discrimination and racial intimidation and violence. This history has created a current climate in which majority-minority districts are necessary to ensure that African-American voters are fairly represented.

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[19] *See Miller*, 115 S. Ct. 2475, 2482 (1993); *Shaw*, 113 S. Ct. 2816, 2818 (1995).

[20] *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921).

A. North Carolina Had A Compelling Interest in Engaging in Race-Conscious Districting to Remedy the Legacy of Racial Discrimination in the North Carolina Political System

The Fifteenth Amendment, ratified in 1870, declares that the right to vote "shall not be denied . . . by any State on account of race." Notwithstanding this direct constitutional command, North Carolina and other southern states have only recently abandoned—after being forced to do so by the Voting Rights Act and federal court enforcement of the same—policies and practices designed to exclude African Americans from full political participation. North Carolina's long legacy of racial exclusion began not long after ratification of the Fifteenth Amendment.

In 1898, white Democrats launched a "White Supremacy Campaign." Fannifold M. Simmons, North Carolina Democratic Party Chairman, issued the following warning to his fellow white North Carolinians, which captures the racial attitudes of this period:

> NEGRO CONGRESSMEN, NEGRO SOLICITORS, NEGRO REVENUE OFFICERS, NEGRO COLLECTORS OF CUSTOMS, NEGROES in charge of white institutions. NEGROES in charge of white schools, NEGROES holding inquests over the white dead . . . .[21]

He then declared:

> North Carolina is a WHITE MAN'S state, and WHITE MEN will rule it, and they will crush the party of Negro domination beneath a majority so overwhelming that no other party will ever again dare to attempt to establish negro rule here.[22]

[21] J.A. 611.

White passions were so inflamed by this type of rhetoric that violence directed at African Americans and white Republicans was rampant. A particularly militant white group, the Red Shirts, armed themselves "with Winchester rifles and shotguns . . . . [and] stalked about, frightening Republicans, Fusionists, and blacks away from the polls."[23]

Legislators, newly-elected as a result of this campaign, enacted a program to enforce with laws the racial exclusion and segregation the campaign had accomplished by violence.[24] The enactment of legislation that would obliterate political participation by African Americans was primary on the agenda of these legislators. They submitted a constitutional amendment to the voters that conditioned the right to register and vote on a poll tax and a literacy test with a "grandfather clause" to protect the voting rights of illiterate white men.

North Carolina's governor from 1901 to 1903, Charles B. Aycock, set the tone for a lengthy period of African-American political exclusion ushered in by the White Supremacy Campaign. Governor Aycock proclaimed:

> I am proud of my State, moreover because there we have solved the Negro problem . . . . We have taken him out of politics and have thereby secured good government under any party and laid

[22] *Id.*

[23] H. Leon Prather, Sr., *The Red Shirt Movement in North Carolina 1898-1900*, 62 J. Negro Hist. 174, 179 (1977).

[24] These legislators were, no doubt, emboldened by the 1896 Supreme Court decision of *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

> foundations for the future development of both races.
>
> I am inclined to give you our solution to this problem. It is first, as far as possible under the Fifteenth Amendment to disfranchise him; after that let him alone, quit writing about him; quit talking about him . . . let the Negro learn once and for all that there is unending separation of the races . . . that they cannot intermingle; let the white man determine that no man shall by act or thought or speech cross this line, and the race problem will be at an end.[23]

Other North Carolina leaders also expressed their commitment to policies of racial exclusion. North Carolina Governor Thomas Walter Bickett proclaimed in 1920:

> In North Carolina we have definitely decided that the happiness of both races requires that the white government shall be supreme and unchallenged in our borders.[24]

John Parker, upon accepting the 1920 Republican nomination for Governor of North Carolina, stated:

> The Negro as a clan does not desire to enter politics. The Republican party of North Carolina does not desire him to do so. We recognize the fact

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[23] Charles B. Aycock, Speech before the North Carolina Society, Baltimore (Dec. 18, 1903), in *The North Carolina Experience: An Interpretive and Documentary History* 415 (Lindley S. Butler & Alan D. Watson eds., 1984).

[24] Thomas W. Bickett, Message to the General Assembly of 1920, in *Public Letters and Papers of Thomas Walter Bickett, Governor of North Carolina 1917-1921* at 72 (R.B. House ed. 1923).

> that he has not yet reached the stage in his development when he can share the burdens and responsibilities of government.[27]

The racial hostility of North Carolina's leaders and citizens, literacy tests and poll taxes all worked together to eliminate African-American political participation in North Carolina. Having accomplished this goal, incidents of racial violence and explicit racial appeals subsided until 1948, when the national Democratic Party included a civil rights plank in its campaign platform. From this point forward, North Carolina has experienced a resurgence of appeals to racial prejudice. History has taught us that in America the perception that African Americans are gaining political power can often trigger fear, anger, or, at the very least, anxiety among some whites. This phenomena has motivated violence and direct and subtle racial campaign appeals.

In 1950, Willis Smith used racial appeals to defeat incumbent Frank Porter Graham in a Democratic primary campaign for nomination to the United States Senate. Graham had been a prominent supporter of New Deal policies and had given qualified support to the civil rights policies of the Truman Administration. In the runoff primary of 1950, supporters of Willis Smith distributed leaflets warning **"White People Wake Up! . . . Frank Graham Favors Mingling of the Races."**[28] In a racially-charged atmosphere, this accusation and others were sufficient to cost Graham the election.[29]

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[27] John Parker, An Address Upon Accepting the Republican Nomination for Governor (April 18, 1920), *quoted in* Richard L. Watson, *The Defeat of Judge Parker: A Study in Pressure Groups and Politics*, 50 Miss. Valley Hist. Rev. 213, 218 (1963).

[28] J.A. 614.

[29] Expert Witness Report Prepared by Professor Harry L. Watson, Race and Politics in North Carolina, 1865-1994 at 11-12 [hereinafter Watson Report].

After the *Brown* v. *Board of Education* decision in 1954, white fears of desegregation increased as did political appeals to racial prejudice. In 1955, for example, North Carolina Senator Sam Ervin drafted the "Southern Manifesto" pledging resistance to the desegregation process ordered by the United States Supreme Court *Brown* decision. Two of the three North Carolina representatives who refused to endorse the Southern Manifesto lost their bids for reelection after a vigorous campaign by segregationist groups.[20/]

Moreover, North Carolina's history of discrimination in the electoral process is not confined to the Reconstruction and post-*Brown* eras. Even after passage of the Voting Rights Act, appeals to white racial fears have persisted in North Carolina elections. In 1966, two Democratic congressmen were defeated in a campaign in which Ku Klux Klan leaders handed out leaflets charging that the incumbents had bowed to federal pressures for desegregation.[21/] George Wallace's 1968 presidential campaign appealed to voters' fears of court-ordered busing.[22/] And, Jesse Helms, in his bid for Senate in 1972, received a public endorsement from the Grand Dragon of the North Carolina Ku Klux Klan.[23/]

In the 1980's and 1990's, North Carolina's legacy of race-baiting campaigns has continued unabated. In 1983, an advertisement supporting Jesse Helms' bid for governor against Jim Hunt depicted Hunt sitting beside Jesse Jackson with accompanying quotations warning of the prospect of increased voter registration.[24/] Commenting on this type of ad, one journalist remarked, "the primary motive is simply to make the association between Hunt and

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[20/] J.A. 615.

[21/] J.A. 617.

[22/] *Charlotte News*, Oct. 29, 1968, at 5C.

[23/] J.A. 618.

[24/] *Id.*

blacks and to raise fears among whites that Hunt is a captive of black voters."[25/]

Helms and the Republican party used a multitude of racially-oriented signals during Helms' 1990 bid for reelection to the Senate against an African-American candidate, Harvey Gantt. Representative J. Alex McMillan of the 9th District fanned racial fears with a 1990 fundraising letter that warned of "the potential danger of a sophisticated get-out-the-vote effort among the hard core Gantt constituency."[26/] Gantt had been leading Helms in the polls until the final week of the race when the Helms campaign ran an advertisement showing a white man's hand crumpling a job rejection notice, with a voice-over explaining:

> You needed that job, and you were the best qualified. But they had to give it to a minority because of a racial quota. Is that really fair? Harvey Gantt says it is. Gantt supports Ted Kennedy's racial quota law that makes the color of your skin more important than your qualifications.[27/]

This advertisement galvanized white support for Helms, bringing him victory.[28/] During the same campaign season, an anonymous leaflet appeared in rural Columbus County, warning voters of "the

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[25/] Watson Report, *supra* note 29, at 18 (citing *What North Carolina Newspapers Say About Voter Registration*, News of Orange County, June 8, 1983).

[26/] J.A. 624.

[27/] Kathleen H. Jamieson, *Dirty Politics* '80 at 97 (1992).

[28/] *Id.* at 99-100.

Negro vote" and of the possibility that "more Negroes will vote in this election than ever before."[39]

In the 1992 presidential campaign, local Republican Party advertisements warned "[I]f Bill Clinton is elected President, Jesse Jackson will be a U.S. Senator."[40] Significantly, the modern pattern of using race to contaminate the electoral process has not been confined to inciting the racial fears of whites. Rather, the political environment in North Carolina is, in many ways, reminiscent of North Carolina's earlier history of intimidating African Americans away from polling booths. For example, the North Carolina Republican Party engaged in a massive "postcard campaign," mailing postcards to black voters to discourage them from voting by threatening prosecution of voters who gave false information to local Board of Elections officials. *See United States* v. *North Carolina Republican Party*, 91-161-Civ-5F (E.D.N.C. Feb. 27, 1992).

The continued vigor of racial discrimination in North Carolina is not surprising. Indeed, a mere decade ago federal courts found that North Carolina's *de jure* exclusion of African Americans from the voting process—with, among other means, a poll tax, a literacy test, and a prohibition against bullet voting[41]—had contributed to the continuing suppression of African-American

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[39] Watson Report, *supra* note 29, at 21.

[40] *Id.* (citing Fayetteville Observer-Times, Oct. 27, 1992, 6A).

[41] Bullet voting is a practice designed to maximize a group's voting strength in at-large voting schemes. In at-large districts—where multiple seats are filled in a single election—voters may cast one vote for as many candidates as there are seats available. Thus, if there are five seats available, each voter may cast a vote for five of the candidates running. In the case of bullet voting, instead of casting all of their votes, voters vote only for a "target" candidate, thereby avoiding the dilution of their vote that would result from voting for a full slate. Bullet voting provides gains to the "target" candidate relative to other candidates and therefore increases the likelihood of minority representation.

participation in North Carolina's political process.[42] In the *Gingles* opinion, the district court expressed hope that continued registration efforts would overcome the chilling effect of North Carolina's legacy of racial exclusion and political appeals to racial prejudice.[43] However, the lingering effects of historic discrimination in voting—as well as in other facets of civic life—persist.

The exclusion of African Americans from participating in North Carolina's political system has served to reinforce the legacy of racial segregation. For example, black North Carolinians endure poverty, inadequate education and medical care, infant mortality, unemployment and violent crime more acutely than their white counterparts.[44] A shared history of political exclusion and discrimination has created among North Carolinians a shared interest in effective political participation, including the ability to elect candidates of their choice.[45] North Carolina's 1991 redistricting legislation was not only a step toward recognizing that African-American North Carolinians disproportionately suffer from the above-mentioned harms, but also a step toward remedying them through the democratic process.

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[42] *See Gingles* v. *Edmisten*, 590 F. Supp. 345, 359-61 (E.D.N.C. 1984), *modified sub nom.*, *Thornburg* v. *Gingles* 478 U.S. 30 (1986).

[43] *Gingles*, 590 F. Supp. 345, 361.

[44] J.A. 194–99.

[45] *See Thornburg* v. *Gingles*, 478 U.S. 30, 64 (1986) (acknowledging racial groups frequently share socioeconomic characteristics such as income level, education, employment status, living conditions, language patterns and more).

B. Majority-Minority Districts Are Necessary Tools to Offset the Effects of Racially-Polarized Voting and Past Discrimination

The above-described legacy of *de jure* discrimination and race baiting campaign tactics has had a deleterious effect on African-American political participation. In addition, race-conscious districting in North Carolina, which began well before the 1992 legislation, also has contributed to the exclusion of African Americans from political discourse. North Carolina traditionally has considered race in making districting decisions. However, only in 1992 was the goal of North Carolina legislators to enhance minority representation, rather than to diminish it.

When first enfranchised, African-American men demonstrated an overwhelming preference for Republican candidates.[46] When Democrats attained a majority in the legislature in 1870, after a campaign of widespread violence and intimidation against African-American and white Republicans, they enacted redistricting legislation that "stacked" African Americans into one congressional district. This district came to be known as the "Black Second."[47] From 1872 until full disenfranchisement of African Americans in 1900, the Black Second contained twice the number of African Americans as their equal distribution would have dictated, thereby limiting African-American control to a maximum of one district out of nine or ten (depending on the total population in the decade).[48]

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[46] Watson Report, *supra* note 29, at 5.

[47] Expert Witness Report Prepared by J. Morgan Kousser, After 120 Years: Redistricting and Racial Discrimination in North Carolina, at 28 (citing Eric Anderson, *Race and Politics in North Carolina, 1872-1901: The Black Second* (1981)) [hereinafter Kousser Report].

[48] *Id.*

The Black Second offered several positive political benefits. African-American voter participation thrived during this period. Up to 85% of potential African-American voters participated in elections during the 1890's.[49] From 1872 to 1900, more than fifty African Americans were elected to the state legislature from areas included in the Black Second. During the same period, the Black Second sent three African Americans to Congress, including, in 1898, George White, the last African American to serve from the South for 72 years.[50]

As Congressman White exited Congress in 1901, North Carolina entered a long period marked by the complete exclusion of African Americans from political participation. When the Voting Rights Act prevented North Carolina from using laws designed to completely eliminate African Americans from the political landscape, North Carolina legislators began to engage instead in redistricting schemes designed to dilute black voting strength.

For example, North Carolina legislators sought a means of minimizing the political influence of the large, politically well-organized black community of Durham County. In 1965, when a redistricting plan would have joined Durham, Wake and Orange counties, conservatives in Wake County protested. Wake County Senator Jyles Coggins warned colleagues about a districting plan that might result in, "Negro block [sic] vot[ing]."[51]

During the 1981 redistricting process, Congressman L.H. Fountain—a conservative, white opponent of the civil rights movement representing a district with a large black population—waged a hard fought battle to minimize the number of

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[49] Kousser Report, *supra* note 47, at 29.

[50] *See* William R. Keech & Michael Sistrom, "North Carolina," in *Quiet Revolution in the South*: *The Impact of the Voting Rights Act 1965-1990* (C. Davidson & B. Grofman 1994) [hereinafter Quiet Revolution].

[51] J.A. at 621.

African Americans in his district. Congressman Fountain ultimately lost this battle after the United States Department of Justice denied the redistricting plan preclearance.[32] As a result, the African-American population in Congressman Fountain's district ultimately grew to 40 percent of the total voting-age population.[33]

Yet, even with a 40 percent African-American population, substantial barriers to black electoral success remained. An African-American candidate, H.M. "Mickey" Michaux ran for Congress in Congressman Fountain's former district against a white Democrat, Tim Valentine.[34] Although Michaux led in the first primary, he ultimately lost after Valentine ran ads invoking white fears of black political power. His ads warned voters that Michaux would benefit from "the same well organized block [sic] vote" and that "my opponent will again be bussing his supporters to the polling place in record numbers."[35] Valentine was ultimately victorious, despite the fact that Michaux received over 90 percent of the black vote.[36] Valentine's use of appeals to racial fears intensified racially polarized voting, resulting in defeat for the candidate preferred by the vast majority of the African-American population in that district.

As previously noted, the goal of *all* districting is to ensure that the votes of numerical minorities are not consistently submerged by those of the majority. Michaux's defeat illustrates that majority-minority districts, including those challenged in this case, are necessary to ensure that racial minorities have the ability to elect candidates of their choice. Thus, the lingering effects of

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[32] J.A. 622-23.

[33] J.A. 623.

[34] *Id.*

[35] *Id.*

[36] *See* Declaration of State Representative Henry M. Michaux.

North Carolina's history—in racist political exclusion, in racial appeals in political campaigns, in redistricting practices—provided a compelling state interest for the creation of the districts challenged in this litigation. *See Shaw* v. *Hunt*, 861 F. Supp. 408, 464-65, 476 (E.D.N.C. 1994).

IV.

REPRESENTATIVES FROM THE CHALLENGED DISTRICTS ASSIDUOUSLY REPRESENT THE INTERESTS OF ALL THEIR CONSTITUENTS

In *Shaw*, this Court stated its fear that representatives from majority-minority districts may "believe that their primary obligation is to represent only members of that group, rather than their constituency as a whole." *Shaw*, 113 S. Ct. at 2827. Because appellants—did not and could not—submit proof that Representatives Clayton and Watt have failed to represent their interests, the Court should presume that Representatives Clayton and Watt have fully represented appellants and the rest of their constituents. *See Davis* v. *Bandemer*, 478 U.S. 109, 132 (1986). However, even without the benefit of such a presumption, the evidence presented below demonstrated that Representatives Clayton and Watt well represent their constituents of all races.

As a practical matter, the racial makeup of the challenged districts renders it improbable that Representatives Clayton or Watt would ignore their white constituents. Both of the challenged districts have voting-age populations that are approximately 53 percent black, 45 percent white and 3 percent other races. Accordingly, Representatives Clayton and Watt must court the votes of their constituents without regard to race, if they seek to be reelected.[37]

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[37] *Cf. Gingles* v. *Edmisten*, 540 F. Supp. 345, 358 n.21 (1984) (sixty percent black population generally considered necessary to ensure effective voting majority), *modified sub nom.*, *Thornburg* v. *Gingles*, 478 U.S. 30 (continued...)

In addition, those appellants who belong to the Democratic Party certainly have suffered no "representational injury." Representatives Clayton and Watt have voting records, which are essentially indistinguishable from their white Democratic Party partisans.[20] Nor can Republican constituents in these districts claim representational injury, "because one's constitutional rights are not violated merely because the candidate one supports loses the election." *Shaw*, 113 S. Ct. at 2846 (1993) (Souter, J., dissenting) (citing *Whitcomb* v. *Chavis*, 403 U.S. 124, 153-55 (1971)).

In fact, Representatives Clayton and Watt endeavor—as do all Caucus members—to effectively represent all of their constituents.[21] Their ability to ably represent their constituents is enhanced by the communities of shared interests within both districts. For example, many constituents in Congresswoman Clayton's district either currently reside in agricultural settings or are displaced agricultural workers. Accordingly, Clayton has become a member of the House Committees on Agriculture and Small Business. Constituents in Congressman Watt's district, by contrast, reside primarily in urban settings, and the district is characterized by the presence of many financial institutions, and historically black colleges. In order to further the wide range of interests among his constituents, Congressman Watt sits on the House Committee on Banking, Finance and Urban Affairs.

In addition, Representatives Clayton and Watt serve the shared interests of African Americans in their respective districts

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[21](...continued)
(1986).

[20] *See* 52 Cong. Quarterly Weekly Report 3656-67 (1994).

[22] By contrast, for centuries many white legislators at all levels of government have acted against the interests of their African-American constituents. For example, as noted in Part III, Congressman Fountain represented a district with a population that was 40 percent African American, yet he opposed the Civil Rights movement and its legislative enactments.

and in North Carolina as a whole. Judicial recognition of the frequency with which African Americans form communities with distinct political interests is neither "demeaning" nor evidence of unfair "stereotyping." Rather, as Justice Ginsburg noted in *Miller*:

> [E]thnicity itself can tie people together, as volumes of social science literature have documented—even people with divergent economic interests. For this reason, ethnicity is a significant force in political life.
>
> . . .
>
> To accommodate the reality of ethnic bonds, legislatures have long drawn voting districts along ethnic lines. Our Nation's cities are full of districts identified by their ethnic character—Chinese, Irish, Italian, Jewish, Polish, Russian, for example . . . . The creation of ethnic districts reflecting felt identity is not ordinarily viewed as offensive or demeaning to those included in the delineation.[22]

The Caucus maintains that there are African American communities of interest in the challenged districts. However, we also note, along with Justices Stevens and Souter, that if there are no common interests to be found among African Americans in North Carolina, there is *ipso facto*, no "representational injury" suffered by appellants by virtue of their placement in a majority-minority district and representation by an African-American congressperson.[21]

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[22] *Miller*, 115 S. Ct. 2475, 2504-5 (1995) (Ginsburg, J., dissenting).

[21] *Id.*, at 2497-99 (1995) (Stevens, J., dissenting) (noting appellants' standing depends on assumption all black voters will support same candidate and successful candidate will ignore interests of white constituents); *see also Shaw*, 113 S. Ct. 2816, 2845-46 (Souter, J., (continued...)

Finally, Representatives Clayton's and Watt's abilities to serve the interests of their African-American constituents in no way diminishes their abilities to well represent their constituents of other races. Both representatives have undertaken to make themselves accessible to their constituents and to keep their constituents well informed about events in Congress. Congresswoman Clayton, for example, has installed a toll-free phone line to enhance the ability of her largely, low-income rural constituents to communicate with her.[42] In addition, she visits all counties within her district during weekends and congressional recesses, and employs field representatives and case workers who maintain regular, publicized office hours. At the time of trial, she had held more than ten community forums on issues including health care, education, economic development and crime. She regularly informs her constituents of important events in Congress with a community newsletter. According to Congresswoman Clayton, her white constituents communicate their opinions and concerns to her regularly.[43]

Similarly, Congressman Watt reaches out to all his constituents. Upon taking office, Watt mailed every resident in his district a Guide to Constituent Services, containing the addresses and phone numbers of his offices and information regarding federal agencies, passports, government documents and more.[44] Congressman Watt is so adamant about maintaining direct contact with his constituents that he has instituted a policy that his phone

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[41](...continued)
dissenting) (acknowledging commonality of interest among racial minorities and absence of harm to white voters from mere placement in majority-minority districts) .

[42] Witness Statement of Congresswoman Eva M. Clayton at 5.

[43] *Id.*

[44] Witness Statement of Congressman Melvin L. Watt ¶ 16(b) and Exhibit B attached thereto.

calls not be screened.[45] In addition to Congressman Watt's offices in Durham, Greensboro and Charlotte, Congressman Watt employs a mobile caseworker who maintains office hours in municipal facilities throughout each area of the district. The Congressman regularly mails information to mayors and city managers in his district regarding the impact of federal legislation. His mailings have addressed empowerment zones, the earned income tax credit and community banking legislation. Finally, like Congresswoman Clayton, Congressman Watt has conducted several town meetings, where black and white constituents alike express their concerns and opinions.[46]

The evidence below clearly demonstrated that Representatives Clayton and Watt have served all their constituents effectively, and appellants have not suffered any "representational harm" due to their residence in a majority-minority district.

V.

SHAW AND *MILLER* WERE WRONGLY DECIDED

In the event this Court finds itself obligated by the standards set forth in *Shaw* and *Miller* to hold that the challenged districts violate the Equal Protection Clause, we submit that the Court should take this opportunity to repudiate the holdings of those two cases pursuant to the rationale articulated in *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995).

In *Adarand*, the Court abandoned principles laid out in a case decided only five years earlier. In departing from such recent precedent, Justice O'Connor, writing for the majority, acknowledged that

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[45] *Id.* at ¶ 16(c).

[46] *Id.* at ¶ 16(f).

> [r]emaining true to an "intrinsically sounder" doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete. In such a situation, "special justification" exists to depart from the recently decided case.

Id., 115 S. Ct. at 2115. This Court should be no less reluctant to depart from the holdings of *Shaw* and its progeny, because, like *Plessy v. Ferguson*, *Shaw* was wrong the day it was decided.[27]

Conclusion

Although all parties long for the day when one's race has little or no effect on the quality of one's life, appellees and the Caucus realize that because that day has not arrived, majority-minority districts are necessary. Americans of all races see the world through prisms colored by their individual and collective pasts. For this reason, a district that to some resembles a "bug splattered on a windshield,"[28] may to others look more like a winding path leading to political inclusion. Racism persists in America; African Americans routinely suffer racism in their daily

[27] In *Fullilove v. Klutznick*, 448 U.S. 448, 522 (1980), Justice Rehnquist joined Justice Stewart's view that "*Plessy v. Ferguson* was wrong when decided." This view has been endorsed by two members of the *Shaw* majority. *See Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2813 (1993) ("[W]e think *Plessy* was wrong the day it was decided.") For an argument that *Shaw* was wrongly decided, *see* A. Leon Higginbotham, Jr., G. Clarick, & M. David, *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 Fordham L. Rev. 1593 (1994).

[28] *Shaw*, 113 S. Ct. 2816, 2820 (quoting *Wall St. J.*, Feb. 4, 1992, at A14).

lives. The reality of life in the United States prevents African Americans from enjoying the luxury of pretending America is color blind. As this Court makes a decision fundamental to the future of our representative democracy, it must accept what most African Americans and many Americans of all races know to be true: race still matters.[29] In America today, voting is racially polarized and the color of a candidate's skin affects voter attitudes. In this light, the necessity of majority-minority districting to render our democracy representative is compelling.

The lower court in *Shaw* v. *Hunt* correctly decided that North Carolina's legacy of racial discrimination and political exclusion called out for a remedy. As a direct result of North Carolina's racist policies, from 1901 to 1993 no African American from North Carolina served in the United States Congress.[30] North Carolina's 1992 redistricting legislation represents a good faith effort to remedy its tragic history of racial exclusion. Now, for the first time in its history, North Carolina has an integrated congressional delegation that reflects the State's racial diversity.

This Court should uphold the judgment of the district court below to the extent it found North Carolina's redistricting legislation to be a narrowly tailored means of serving a compelling state interest in redressing North Carolina's long history of racial discrimination and political exclusion. A decision upholding the constitutionality of the majority-minority districts in North Carolina

[29] *See* Cornel West, *Race Matters* 3 (1993):

> To engage in a serious discussion of race in America, we must begin not with the problems of black people but with the flaws of American society-flaws rooted in historic inequalities and longstanding cultural stereotypes. How we set up the terms for discussing racial issues shapes our perception and response to these issues.

[30] *See* Appendix A.

would be in accord with the evidence presented below, based on the standards articulated in *Shaw* and *Miller*, and a rendering of justice.

Dated: October 25, 1995

Respectfully submitted,

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APPENDIX A

APPENDIX A:

AFRICAN AMERICANS IN THE U.S. CONGRESS, 1870–1995

United States Senate

Member	*Party-State*	*Years*
Hiram R. Revels	R-MS	1870-71
Blanche K. Bruce	R-MS	1875-81
Edward W. Brooke	R-MA	1967-79
Carol Moseley-Braun	D-IL	1993-

United States House of Representatives

Joseph H. Rainey	R-SC	1870-79
Jefferson F. Long	R-GA	1870-71
Robert B. Elliot	R-SC	1871-74
Robert C. De Large	R-SC	1871-73
Benjamin S. Turner	R-AL	1871-73
Josiah T. Walls	R-FL	1871-73
Richard H. Cain	R-SC	1873-75
		1877-79
John R. Lynch	R-MS	1873-77
		1882-83
James T. Rapier	R-AL	1873-75
Alonzo J. Ransier	R-SC	1873-75
Jeremiah Haralson	R-AL	1875-77

John A. Hyman	R-NC	1875–77
Charles E. Nash	R-LA	1875–77
Robert Smalls	R-SC	1875–79
James E. O'Hara	R-NC	1883–87
Henry P. Cheatham	R-NC	1889–93
John M. Langston	R-VA	1890–91
Thomas E. Miller	R-SC	1890–91
George W. Murry	R-SC	1893–95
		1896–97
George W. White	R-NC	1897–1901
Oscar DePriest	R-IL	1929–35
Arthur W. Mitchell	D-IL	1935–43
William L. Dawson	D-IL	1943–70
Adam C. Powell, Jr.	D-NY	1945–67
		1969–71
Charles C. Diggs, Jr.	D-MI	1955–80
Robert N.C. Nix	D-PA	1958–78
Augustus F. Hawkins	D-CA	1963–90
John Conyers, Jr.	D-MI	1965–
William L. Clay	D-MO	1969–
Louis Stokes	D-OH	1969–
Shirley A. Chisholm	D-NY	1969–82
George W. Collins	D-IL	1970–72
Ronald V. Dellums	D-CA	1971–
Ralph H. Metcalfe	D-IL	1971–78
Parren H. Mitchell	D-MD	1971–86
Charles B. Rangel	D-NY	1971–
Walter E. Fauntroy	D-D.C.	1971–90
Yvonne B. Burke	D-CA	1973–79
Cardiss Collins	D-IL	1973–
Barbara C. Jordan	D-TX	1973–78
Andrew J. Young	D-GA	1973–77
Harold E. Ford	D-TN	1975–
Bennett M. Steward	D-IL	1979–80
Julian C. Dixon	D-CA	1979–
William H. Gray	D-PA	1979–91
Mickey Leland	D-TX	1979–89
Melvin Evans	R-V.I.	1979–80
George W. Crockett, Jr.	D-MI	1980–90
Mervyn M. Dymally	D-CA	1981–92
Gus Savage	D-IL	1981–92
Harold Washington	D-IL	1981–83
Katie B. Hall	D-IN	1982–84
Major R. Owens	D-NY	1983–
Edolphus Towns	D-NY	1983–
Alan Wheat	D-MO	1983–94

Charles A. Hayes	D-MO	1983-92
Alton R. Waldon, Jr.	D-NY	1986-
Mike Espy	D-MS	1987-93
Floyd H. Flake	D-NY	1987-
John Lewis	D-GA	1987-
Kweisi Mfume	D-MD	1987-
Donald M. Payne	D-NJ	1989-
Craig A. Washington	D-TX	1989-94
Barbara R. Collins	D-MI	1991-
Gary A. Franks	R-CT	1991-
William J. Jefferson	D-LA	1991-
Eleanor H. Norton	D-D.C.	1991-
Maxine Waters	D-CA	1991-
Lucien E. Blackwell	D-PA	1991-94
Sanford Bishop	D-GA	1993-
Corrine Brown	D-FL	1993-
Eva M. Clayton	D-NC	1993-
James E. Clyburn	D-SC	1993-
Cleo Fields	D-LA	1993-
Alcee L. Hastings	D-FL	1993-
Earl F. Hillard	D-AL	1993-
Eddie B. Johnson	D-TX	1993-
Cynthia McKinney	D-GA	1993-

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Supreme Court, U.S.
FILED
OCT 25 1995
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In The

Supreme Court of the United States

October Term, 1995

RUTH O. SHAW, et al.,

Appellants,

v.

JAMES B. HUNT, JR., et al.,

Appellees,

JAMES ARTHUR POPE, et al.,

Appellants,

v.

JAMES B. HUNT, JR., et al.,

Appellees.

On Appeal From The United States District Court
For The Eastern District Of North Carolina

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF APPELLEES

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, nonpartisan organization with nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. As part of that commitment, the ACLU has been active in defending the equal right of racial and other minorities to participate in the electoral process. Specifically, the ACLU has provided legal representation to minorities in numerous jurisdictions throughout the country, and has frequently participated in voting rights cases before this Court, both as direct counsel, *see, e.g., Miller v. Johnson*, 115 S.Ct. 2475 (1995); *Holder v. Hall*, 114 S.Ct. 2581 (1994); *McCain v. Lybrand*, 465 U.S. 236 (1984); *Rogers v. Lodge*, 458 U.S. 613 (1982), and as *amicus curiae, see, e.g., United States v. Hays*, 115 S.Ct. 2431 (1995); and *Davis v. Bandemer*, 478 U.S. 109 (1986).

The Lawyers' Committee is a non-profit organization created in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure equal rights to all Americans. Protection of the voting rights of citizens has been an important aspect of the work of the Committee. The Committee has provided legal representation to litigants in numerous voting rights cases throughout the nation over the last 30 years, including cases before this Court, *see, e.g., Clark v. Roemer*, 500 U.S. 646 (1991); *Clinton*

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

v. Smith, 488 U.S. 988 (1988); and *Connor v. Finch*, 431 U.S. 407 (1977). The Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court, *see, e.g., Thornburg v. Gingles*, 478 U.S. 30 (1986); *Rogers v. Lodge, supra*; and *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

SUMMARY OF ARGUMENT

The adoption of appellants' "race neutral" standard in redistricting – in reality a standard requiring or favoring majority white districts – would amount to repeal of the Voting Rights Act and would inevitably result in the broad purge of minorities from elected office. Congress's amendment of Section 2 of the Voting Rights Act in 1982 was premised on the fact that a "race neutral" election practice – one not enacted for a discriminatory purpose – could nevertheless deny minority citizens the opportunity for equal political participation because of the impact of racially polarized voting patterns. This Court has never held that a jurisdiction must blind itself to the racial consequences of its redistricting, or that race conscious remedial plans can never survive strict scrutiny.

The adoption of a rule that only majority white districts are presumed to be constitutional under the Fourteenth Amendment would be devastating for minority office holding since minorities have been elected in North Carolina and in the South – at the local, state, and national levels – primarily in majority-minority districts.

Of the 17 African-Americans elected to Congress in 1992 and 1994 from the 11 states of the old Confederacy,

all were elected from majority-minority districts. A pattern of minority office holding similar to that in Congress exists for southern state legislatures, counties, and municipalities. This pattern of minority office holding confined almost exclusively to majority-minority districts in the South is the direct result of racially polarized voting patterns that have prevailed long after the abolition of the white primary and the poll tax. Appellants' demand for allegedly "race neutral" majority white election districts simply ignores the fact that racial bloc voting is itself a form of racial discrimination which the states must have the power to ameliorate by drawing district lines that afford a measure of equal electoral opportunity to minority voters.

During the 1982 congressional hearings on the extension and amendment of the Voting Rights Act, opponents argued that the amendment of Section 2 would limit the political opportunities of minorities and would prevent minority members from exercising influence on the political system. Congress weighed these arguments, but determined that minorities should be guaranteed the equal right to elect representatives of their choice, and that districting systems were an appropriate way of securing that right. This Court should reject appellants' efforts to enact as constitutional doctrine the contrary political views that were unable to command majority support in Congress.

Congress also concluded that there was no factual basis for contending that majority-minority districts increased racial tensions or caused other harm. The decisions of district courts in the post-*Shaw v. Reno* redistricting cases do not contradict but support the findings of

Congress. The majority-minority congressional districts in the South are in fact the most *racially integrated* districts in the country. Far from causing harm, the evidence suggests that integrated majority-minority districts have promoted the formation of biracial coalitions and actually dampened racial bloc voting.

Voting districts have traditionally been drawn to accommodate the interests of various racial or ethnic groups. To apply a different standard in redistricting to African-Americans based upon speculative assumptions about segregation and harm would deny them the recognition given to others. To require the use of majority white districts only, and to do so in the name of color-blindness or the Fourteenth Amendment, whose very purpose was to guarantee equal treatment for blacks, would be a stunning irony.

The combination of *Shaw* and *Miller* has already precipitated a broad attack on majority-minority districts in various southern states. This Court could not have contemplated, and should not countenance, such a result.

ARGUMENT

I. Adoption of Appellants' "Race Neutral" Standard Would Repeal the Voting Rights Act and Purge Minorities from Office

Appellants make the extreme argument that where race has been a factor in redistricting in creating majority-minority districts "no claimed state interest should be

considered 'compelling' enough to pass the 'strict scrutiny' test." Brief of Appellants Shaw, *et al.*, on the Merits, p. 22. According to appellants, a jurisdiction might have a "strong interest" but it would never have a " 'compelling interest' in compliance with federal voting rights legislation." *Id.* at 32. Instead, the state's only " 'interest' would be to enact a race-neutral plan," *id.* at 33, *i.e.*, one in which all the districts were presumably majority white.

The adoption of such a "race neutral" standard – in reality a standard requiring or favoring majority white districts – would amount to repeal of the Voting Rights Act and would inevitably result in the broad purge of minorities from elected office. Congress's amendment of Section 2 of the Voting Rights Act in 1982 was premised on the fact that a "race neutral" election practice – one not enacted for a discriminatory purpose – could nevertheless deny minority citizens the opportunity for equal political participation because of the impact of racially polarized voting patterns. *See Thornburg v. Gingles*, 478 U.S. 30, 45 (1986) (Congress rejected a racial purpose standard in favor of one embodying "a 'functional' view of the political process"). For this reason, among others, this Court has never held that a jurisdiction must blind itself to the racial consequences of its redistricting, or that race conscious remedial plans can never survive strict scrutiny. To the contrary, in *Miller v. Johnson*, 115 S.Ct. 2475, 2490 (1995), the Court held that "[t]here is a 'significant state interest in eradicating the effects of past discrimination' ") (*quoting Shaw v. Reno*, 113 S.Ct. 2816, 2831 (1993)). *Also see*, 115 S.Ct. at 2500 ("we agree that . . . to meet statutory requirements, state legislatures must sometimes consider race as a factor highly relevant to the drawing of district lines . . . [and that] state legislatures may recognize

communities that have a particular racial or ethnic makeup, even in the absence of any compulsion to do so, in order to account for interests common to or shared by the persons grouped together") (Ginsburg, J., dissenting).[2]

In addition, on the same day it decided *Miller* the Court summarily affirmed a district court decision rejecting claims identical to those raised by appellants in this case that California's redistricting plans were racial gerrymanders. *See DeWitt v. Wilson*, 115 S.Ct. 2637 (1995). The California plans were drawn by a panel of three Special Masters and were approved by the State Supreme Court after the legislature deadlocked over redistricting. The Special Masters undeniably took race into account as a predominant factor in drawing their plans and frequently subordinated the state's traditional redistricting principles to race.

The Special Masters drew districts to maximize the number of majority-minority districts. According to the Supreme Court of California, the masters engaged in "successful efforts to maximize the actual and potential voting strength of all geographically compact minority groups of significant voting population." *Wilson v. Eu*, 4 Cal.Rptr. 2d 379, 393 (1992). The masters gave "federal

[2] Justice O'Connor made clear in her decisive concurring opinion in *Miller* that most redistricting plans would not be suspect "even though race may well have been considered in the redistricting process." 115 S.Ct. at 2497. *See Metro v. Bolden*, 446 U.S. 55, 87 (1980) (legislators "necessarily make judgments about the probability that the members of certain identifiable groups, whether racial, ethnic, economic, or religious, will vote in the same way") (Stevens, J., concurring in the judgment).

Voting Rights Act requirements . . . the highest possible consideration." *Id.* at 397. Because they were unaware of patterns of racial bloc voting, they chose to "draw boundaries that will withstand section 2 challenges under any foreseeable combination of factual circumstances and legal rulings." *Id.* at 399.

Despite the deliberate creation of majority-minority districts, the three-judge court found that strict scrutiny was not required because the masters "sought to balance the many traditional redistricting principles, including the requirements of the Voting Rights Act." *DeWitt v. Wilson*, 856 F.Supp. 1409, 1413 (E.D.Cal. 1994). The district court further held that even if it were applicable, the plans would survive strict scrutiny analysis. 856 F.Supp. at 1415. As the affirmance of *DeWitt* shows, 115 S.Ct. 2637, there is no basis in the decisions of this Court, nor in the experience of real world redistricting,[3] for appellants' extreme "race neutral" standard.

The adoption of a rule that only majority white districts are presumed to be constitutional under the Fourteenth Amendment would be devastating for minority office holding since minorities have been elected in North Carolina and in the South – at the local, state, and national levels – primarily in majority-minority districts.

[3] Robert G. Dixon, Jr., a leading scholar of reapportionment, has written that: "The key concept to grasp is that there are no neutral lines for legislative districts . . . every line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place." "Fair Criteria and Procedure for Establishing Legislative Districts" 7-8, in *Representation and Redistricting Issues* (Grofman, Lijphart, McKay & Scarrow eds., 1982).

The most comprehensive and systematic study to date of the Voting Rights Act is *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990* (Chandler Davidson & Bernard Grofman eds., 1994), a collaborative effort by 27 political scientists, historians, and lawyers funded by the National Science Foundation.[4] It examined the impact of the Act in eight southern states covered in whole or in part by the special preclearance provisions of Section 5.[5] The three principal conclusions of the study are:

> First, the increase in the number of blacks elected to office in the South is a product of the increase in the number of majority-black districts and not of blacks winning in majority-white districts. Second, even today black populations well above 50 percent appear necessary if blacks are to have a realistic opportunity to elect representatives of their choice in the South. Third, the increase in the number of black districts in the South is primarily the result not of redistricting changes based on population shifts as reflected in the decennial census but, rather,

[4] *See* Richard H. Pildes, "The Politics of Race," 108 *Harv. L. Rev.* 1359, 1362 (1995) ("Utterly free of ideological cant, *Quiet Revolution* presents the most sober, comprehensive, and significant empirical study of the precise effects of the VRA ever undertaken. . . . With its rigorous methodology and systematic approach, *Quiet Revolution* immediately renders obsolete prior academic, judicial, and media accounts of the Act that rest on more anecdotal or speculative assertions.").

[5] The states are Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia. Five counties in Florida are also covered by Section 5, but that state was not included in the study. No portions of Arkansas or Tennessee, the other two Confederate States, are covered by Section 5. 28 C.F.R. pat. 51, App. (1994).

> of those required by the Voting Rights Act of 1965 and its 1982 amendments. . . . Federal intervention of this nature, as well as voting rights suits brought by private litigants, was primarily responsible for the significant increase in southern black officeholding.

Lisa Handley & Bernard Grofman, "The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations," in *Quiet Revolution, supra,* at 335-36.

Prior studies are generally consistent with these findings. *See* Chandler Davidson & George Korbel, "At-Large Elections and Minority-Group Representation: A Re-Examination of Historical and Contemporary Evidence," 43 *J. Pol.* 982 (1981); M. Margaret Conway, *Political Participation in the United States* 185 (1991); Charles S. Bullock, III, "Section 2 of the Voting Rights Act, Districting Formats, and the Election of African Americans," 56 *J. Pol.* 1098, 1103-04 (1994).

As an illustration of the findings of *Quiet Revolution*, of the 17 African-Americans elected to Congress in 1992 and 1994 from the 11 states of the old Confederacy, *all* were elected from majority-minority districts. 1990 U.S. Census, Population and Housing Profile; Congressional Districts of the 103rd Congress, C.Q. Weekly Report, V. 51, 3473-3487; David A. Bositis, *Redistricting and Representation: The Creation of Majority-Minority Districts and the Evolving Party System in the South* 14, 86 (Joint Center for Political and Economic Studies, 1995). For minorities to win in these states, it has generally been necessary for

them to run in districts with a majority-minority population.

The only black in the twentieth century to win a seat in Congress from a majority white district in one of the southern states targeted by the Voting Rights Act was Andrew Young. He was elected in 1972 from the Fifth Congressional District located in the Atlanta metropolitan area and in which blacks were over 40% of the population. Laughlin McDonald, Michael Binford & Ken Johnson, "Georgia," in *Quiet Revolution, supra,* at 85. Still, voting was strongly racially polarized and he got only 25% of the white vote. In 1990 Young ran for Governor of Georgia. In both the primary and runoff he again got about one-fourth of the white vote, but running statewide where blacks are 27% of the population he was defeated. *Id.*

Barbara Jordan, another African-American, was elected to Congress in 1972 from the Eighteenth District in Texas, but the district was minority Anglo. It contained a black population of 42% and a Mexican American population of 20%. Michael Barone and Grant Ujifusa, *The Almanac of American Politics 1974,* 1003 (1973).

Abolition of majority-minority districts would likely result in the elimination of most, if not all, of the African-American members of Congress from the South. The results in the rest of the country could be almost as dramatic. Of the 22 black members elected outside the South, only three were elected from majority white congressional districts. Elaine R. Jones, "In Peril: Black Lawmakers," *The New York Times,* Sept. 11, 1994, E19.

A pattern of minority office holding similar to that in Congress exists for southern state legislatures. Throughout the 1970s and 1980s, only about 1% of majority white districts elected a black. Blacks who were elected were overwhelmingly elected from majority black districts. Handley & Grofman, in *Quiet Revolution, supra,* at 336-37. As of 1988, no blacks were elected from majority white districts in Alabama, Arkansas, Louisiana, Mississippi, and South Carolina. *Id.* at 346.

The same pattern of an increase in the number of majority-minority districts and elected minority officials is repeated for southern cities and counties. As noted in *Quiet Revolution*:

> [We] reaffirm the standard view that at-large elections have deleterious effects on black representation for cities with white majorities and a black population of at least 10 percent. . . . [D]ramatic gains in black representation followed abolition of at-large elections – gains much greater than in cities that remained at large. (The negative impact of at-large elections is felt in county government too . . .).

Bernard Grofman and Chandler Davidson, "The Effect of Municipal Election Structure on Black Representation in Eight Southern States," in *Quiet Revolution, supra,* at 319.

This pattern of minority office holding confined almost exclusively to majority-minority districts in the South is the direct result of racially polarized voting patterns that have prevailed long after the abolition of the white primary and the poll tax. Appellants' demand for allegedly "race neutral" majority white election districts simply ignores the fact that racial bloc voting is itself a

form of racial discrimination which the states must have the power to ameliorate by drawing district lines that afford a measure of equal electoral opportunity to minority voters.

Deconstructing majority-minority districts would likely return North Carolina and the South to the days when legislative bodies were largely, or exclusively, white. John Lewis, who represents the Fifth Congressional District in Atlanta, called the attack on majority-minority districts unleashed by *Shaw v. Reno*, *supra*, "the greatest threat to the Voting Rights Act since it was written in August 6, 1965. If it wasn't for the Voting Rights Act, it would still be primarily white men in blue suits in Congress." Laughlin McDonald, "Voting Rights and the Court: Drawing the Lines," 15 *S. Changes*, Fall 1993, at 1, 5.

II. Congress Has Sanctioned the Creation of Majority-Minority Districts

Appellants' attack on the legislature's ability to draw majority black districts as a remedial measure is a poorly disguised effort to persuade this Court to adopt the political judgment of the congressional opponents of amended Section 2 of the Voting Rights Act. During the 1982 congressional hearings on the extension and amendment of the Voting Rights Act, opponents argued that the amendment of Section 2 would limit the political opportunities of minorities by allowing them "to become isolated" in single member districts, and would "prevent minority members from exercising influence on the political system beyond the bounds of their quota." *Voting Rights Act:*

Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 511 (statement of Dr. Edward J. Erler) and 1115 (statement of Robert M. Brinson) (1982). Dissenting members of the Senate subcommittee similarly argued that adoption of a results standard for Section 2 would lead to the creation of majority-minority districts, or "political ghettos for minorities," and that while "[m]inority *representation* in the most primitive sense may be enhanced by the proposed amendment . . . minority *influence* would suffer enormously." S.Rep. No. 417, 97th Cong., 2d Sess. 103 (1982) (additional views of Sen. Orrin G. Hatch of Utah).

Congress weighed these arguments, but determined that minorities should be guaranteed the equal right to elect representatives of their choice, and that districting systems were an appropriate way of securing that right. According to the Senate report, the testimony and other evidence presented to the subcommittee belied the predictions and speculations that the amendment of Section 2 would limit the political opportunities of minorities. *Id.* at 31-32. The subcommittee found there was "an extensive, reliable and reassuring track record of court decisions using the very standard which the Committee bill would codify." *Id.* at 32.

The principal decision on which the committee relied was *White v. Regester*, 412 U.S. 755 (1973), invalidating multimember legislative districts on the ground that they diluted minority voting strength and requiring the adoption of single member districts to bring the minority community "into [the] full stream of political life of the county and State." *Id.* at 769, 773. In 1982 Congress adopted the legal standard for proving vote dilution

established in *White v. Regester* as the "results test" of amended Section 2. *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986).

The Senate report, moreover, provides that in implementing remedies for Section 2 violations, a

> court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.

S.Rep. No. 417, *supra*, at 31. One of the cases cited in the report as representing the "complete and full" remedy standard was *Kirksey v. Board of Supervisors*, 554 F.2d 139, 150-51 (5th Cir. 1977), in which the court rejected a proposed redistricting plan for a county board of supervisors because the two minority districts contained only "skin-of-the-teeth" black majorities, and therefore failed to provide blacks a "realistic opportunity" to elect representatives of their choice. The court also rejected the claim that an ameliorative plan "would be a racial gerrymander." *Id.* at 151.

In light of the legislative history and the language of the statute, the Court has consistently held that Section 2 guarantees the right "of a protected class to elect its candidate of choice on an equal basis with other voters." *Voinovich v. Quilter*, 113 S.Ct. 1149, 1155 (1993). And where violations are established, Congress itself has determined that complete and full remedies, including majority-minority single member districts, may properly be implemented. *See Johnson v. De Grandy*, 114 S.Ct. 2647,

2661 (1994) ("society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity"). This Court should reject appellants' efforts to enact as constitutional doctrine the contrary political views that were unable to command majority support in Congress.[6]

III. Racially Integrated Districts Do Not Segregate or Cause Harm

Appellants argue that majority-minority districts are a form of segregation, Brief of Appellants Shaw, *et al.*, on the Merits, p. 33, but legally and factually the claim has no merit. In the context of political participation, segregation involved, among other things, denying blacks the rights to register and vote, *South Carolina v. Katzenbach*, 383 U.S. 301, 310-13 (1966), participate in primary elections, *Smith v. Allwright*, 321 U.S. 649 (1944), and live in neighborhoods of their choice. *Buchanan v. Warley*, 245 U.S. 60 (1917). By contrast, the creation of a majority-minority district does not compel anyone to live there, or to continue living there. It doesn't deny anyone the right to run for office, or to vote for a candidate of his or her choice. No person has their vote diluted simply by reason

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[6] As the district court in *Gingles* observed, Congress has rejected "the fundamental risk that the recognition of 'group voting rights' and the imposing of an affirmative obligation upon government to secure those rights by race-conscious electoral mechanisms was alien to the American political tradition." *Gingles v. Edmisten*, 590 F.Supp. 345, 356-57 (E.D.N.C. 1984), *aff'd in relevant part sub nom. Thornburg v. Gingles, supra.*

of living in a majority white or a majority-minority district. Legally, there is no valid analogy between Jim Crow and North Carolina's congressional redistricting plan.

Congress also concluded that there was no factual basis for contending that majority-minority districts increased racial tensions or caused other harm. Critics of the 1982 amendment argued that a results standard for Section 2 would "deepen the tensions, fragmentation and outright resentment among racial groups," *Voting Rights Act Hearings, supra,* at 662 (statement of John H. Bunzel), would "pit race against race," *id.* at 745 (statement of Michael Levin), "would exacerbate race consciousness," *id.* at 1250 (statement of Prof. Henry Abraham), "may well foster polarization," *id.* at 1328 (statement of Donald L. Horowitz), and would "compel the worst tendencies toward race-based allegiances and divisions." *Id.* at 1449 (letter from Prof. William Van Alstyne) (1982). Congress rejected these arguments on the ground that there was no evidence to support them, and concluded that the amendment would not "be a divisive factor in local communities by emphasizing the role of racial politics." S.Rep. No. 417, *supra,* at 33-2.

The decisions of district courts in the post-*Shaw v. Reno* redistricting cases do not contradict but support the findings of Congress. In *Johnson v. Miller,* 864 F.Supp. 1354, 1370 (S.D.Ga. 1994), the three-judge court, even though it invalidated the Eleventh Congressional District, concluded that "the plaintiffs suffered no individual harm; the 1992 congressional redistricting plans had no adverse consequences for these white voters." A parade of witnesses testified that the Eleventh District had not increased racial tension, caused segregation, imposed a

racial stigma, deprived anyone of representation, caused harm, or was a guaranteed black seat. *Johnson v. Miller,* Civ. No. 194-008 (S.D.Ga.), Trial Transcript, Vol. III, 268; IV, 104, 106, 239, 240, 242; VI, 36, 38, 45, 47, 56, 58, 117, 120. The district court acknowledged that under the Court's pre-*Shaw* decisions, "this lack of concrete, individual harm would deny them standing to sue." 864 F.Supp. at 1370. This Court did not disturb the district court's finding of no harm on appeal. *Miller v. Johnson, supra.*

In *Hays v. Louisiana,* 862 F.Supp. 119 (W.D.La. 1994), *vacated and remanded sub nom. United States v. Hays,* 115 S.Ct. 2431 (1995), the district court acknowledged "the great benefits that are derived by an increase in minority representation in government," that "minorities have shown that they perform admirably," that they "provide positive role models for all black citizens," and that they "insure that the legal obstacles to minority advancement in all areas of life will be eliminated." 862 F.Supp. at 128 (Shaw, J., concurring). Far from polarizing the community or increasing tensions, non-dilutive redistricting plans are a necessary remedy for continuing racial bloc voting and confer a benefit on persons of all races.

The majority-minority congressional districts in the South are in fact the most *racially integrated* districts in the country. They contain substantial numbers of white voters, an average of 45%. Bositis, *Redistricting and Representation, supra,* at 28. Moreover, blacks in the South continue to be represented more often by white than by black members of Congress, 58% versus 42%. *Id.* at 12. No one who has lived through it could ever confuse existing redistricting plans, with their highly integrated districts,

with racial segregation under which blacks were not allowed to vote or run for office. Segregation more accurately describes the systems that existed in states such as North Carolina, South Carolina, and Virginia, where all the congressional districts were majority white and no blacks in modern times had ever been elected to Congress prior to the creation of meaningfully integrated districts.

Whites are also frequently elected from majority-minority districts. During the 1970s whites won in 41% of the majority black house districts and in 75% of the majority black senate districts in seven southern states (Alabama, Georgia, Louisiana, Mississippi, North Carolina (senate only), South Carolina, and Virginia). Handley & Grofman, in *Quiet Revolution, supra*, at 336, 345. In the 1980s in the same states, whites won in 23% of the majority black house districts and in 38% of the majority black senate districts. *Id.* Given these levels of white success, racially integrated majority-minority districts cannot be dismissed simply as "quotas" or segregated seats for minorities.

Far from causing harm, the evidence suggests that integrated majority-minority districts have promoted the formation of biracial coalitions and actually dampened racial bloc voting. In Mississippi, after the creation of the majority black Second Congressional District, Mike Espy, an African-American, was elected in 1986 with about 11% of the white vote and 52% of the vote overall. In 1988 he won re-election with 40% of the white vote and 66% of the vote overall. "Republicans Push 'Hot Button' Issues," 16 *S. Exposure*, Winter 1988, at 5, 7.

In Georgia, the Second and Eleventh Congressional Districts became majority black for the first time in 1992. From 1984 to 1990, only 1% of white voters in the precincts within the Second, and 4% of white voters in the precincts within the Eleventh, voted for minority candidates in statewide elections. A dramatic and encouraging increase in white crossover voting occurred in 1992. Twenty-nine percent of white voters in the Second and 37% of white voters in the Eleventh voted for minority candidates in statewide elections that year. *Johnson v. Miller*, Civ. No. 194-008, *supra*, Department of Justice Exhibit 24, tables I, II, III (report of Allan J. Lichtman). These trends undermine the argument that majority-minority districts have exacerbated racial bloc voting.

According to one veteran observer of the voting rights scene, commenting specifically on the increased willingness of whites in Mississippi to vote for a black candidate in a racially integrated congressional district,

> this suggests that the creation of majority-minority districts and the subsequent election of minority candidates reduces white fear and harmful stereotyping of minority candidates, ameliorates the racial balkanization of American society and promotes a political system in which race does not matter as much as it did before.

Frank R. Parker, "The Constitutionality of Racial Redistricting: A Critique of *Shaw v. Reno*," 3 *D.C. L. Rev.* 1, 19-20 (1995).

Voting districts have traditionally been drawn to accommodate the interests of various racial or ethnic groups – Irish Catholics in San Francisco, Italian-Americans in South Philadelphia, Polish-Americans in Chicago,

see Miller v. Johnson, supra, 115 S.Ct. at 2505 (Ginsburg, J., dissenting), and Anglo-Saxons in North Georgia. Georgia's Ninth Congressional District, which is 95% white, was created in 1980 to preserve in one district the distinctive white community in the mountain counties of the state. *Busbee v. Smith*, 549 F.Supp. 494, 499, 517 (D.D.C. 1982) (the state "placed cohesive white communities throughout the state of Georgia into single Congressional districts . . . [f]or example, the so-called 'mountain counties' of North Georgia"), *aff'd*, 459 U.S. 1166 (1983). The district was again drawn as a majority white district during the 1990 redistricting process, and for the same reasons as in 1980. A member of the house reapportionment committee testified that the residents "are predominantly of an Anglo-Saxon bloodline," and the Ninth District was "drawn purposefully to maintain it as one district, a[n] area that has a distinct culture and heritage." *Johnson v. Miller*, Civ. No. 194-008, *supra*, Transcript of Preliminary Injunction Hearing, April 18, 1994, pp. 126-27.

No court has ever held or suggested that the majority white Ninth District was unconstitutional or constitutionally suspect. To apply a different standard in redistricting to African-Americans based upon speculative assumptions about segregation and harm would deny them the recognition given to others. To require the use of majority white districts only, and to do so in the name of color-blindness or the Fourteenth Amendment, whose very purpose was to guarantee equal treatment for blacks, would be a stunning irony.

IV. The Harm Caused By *Shaw* and *Miller*

The combination of *Shaw* and *Miller* has already precipitated a broad attack on majority-minority districts, a result that could not have been contemplated, and should not be countenanced, by this Court. In her concurring opinion in *Miller*, Justice O'Connor cautioned that the standard announced by the Court was "a demanding one" and "does not throw into doubt the vast majority of the Nation's 435 congressional districts." 115 S.Ct. at 2497. Despite these assurances, *Miller* has had the effect of calling into question the constitutionality not only of majority-minority congressional districts, but majority-minority legislative, county, and municipal districts as well. The unsettling effects of *Miller* have been substantial.

On remand in *Miller*, for example, the plaintiffs promptly moved to add parties to challenge the majority black Second Congressional District. The three-judge court, as promptly, granted the motion. *Johnson v. Miller*, Civ. No. 194-008, *supra*, Transcript of Hearing, August 22, 1995, p. 3. One member of the panel seemed prepared to rule without more that the district was unconstitutional. *Id.* at 66 ("I really don't see that it takes long to look at this horse [*i.e.*, the Second District]. . . . I don't think it will take a long evidentiary hearing to conclude what we have already concluded [about the Eleventh District]") (comments of Judge Edenfield). The Court specifically ruled that it would not allow any intervention by local residents to defend the Second District. *Id.* at 111-12.

Justice Ginsburg characterized the decision of the majority in *Miller* as an "invitation to litigation." 115 S.Ct.

at 2505. It is proving to be exactly that. Immediately after the *Miller* decision, the former speaker of the South Carolina house announced that "I think it would be fairly easy for any plaintiff in South Carolina to attack any of the three plans [congressional, house, senate] which have been adopted and prevail." Cindi Ross Scoppe, "Race-based districts illegal," *The Columbia State*, June 29, 1995, A1. The three plans, all of which contain majority black districts, were adopted as a result of litigation, *Burton v. Sheheen*, 793 F.Supp. 1329 (D.S.C. 1993), *vacated and remanded sub nom. SRAC v. Theodore*, 113 S.Ct. 2954 (1993), and Section 5 preclearance.

It didn't take long for someone to accept the former speaker's invitation to litigate. On September 28, 1995, five South Carolina residents, including a state senator, filed a lawsuit challenging the senate redistricting plan. *Smith v. Beasley*, Civ. No. 3-95-3235-0 (D.S.C.).

In Georgia, the governor called the legislature into special session on August 14, 1995 to redistrict the Congress. Mark Sherman, "Miller calls special session to redraw Georgia districts," *The Atlanta Journal*, July 7, 1995, 1A. However, after several weeks of fruitless wrangling and uncertainty over the standards applicable in redistricting, the legislature adjourned without adopting a plan. Holly Idelson, "It's Back to Drawing Board On Minority Districts," *Congressional Quarterly*, October 7, 1995, p. 3067. The chair of the senate reapportionment committee said that "[w]e have heard from five different attorneys and we have received five different interpretations." Mark Sherman, "Redrawn districts expected to face challenge," *The Atlanta Constitution*, August 2, 1995, B6. The chair said that "[n]obody knows what they're

doing." *Id.* The federal court will now draw the state's congressional redistricting plan.

While the Georgia legislature was unable to redistrict the Congress, it did pass new plans for the senate and the house. Although legislative redistricting was not an issue in *Miller*, and no court has suggested that the house and senate plans were unconstitutional, the governor included legislative redistricting in his call for a special session. Once the legislature was in session, one of the attorneys representing the plaintiffs in *Miller* advised house and senate redistricting committees that "[w]e are prepared to initiate litigation on . . . a number of legislative districts." Mark Sherman, "24 districts targeted for court fight," *The Atlanta Journal*, July 26, 1995. According to one media account, the *Miller* plaintiffs' lawyer identified "17 House and seven Senate districts across the state. Fourteen of those districts are represented by black lawmakers." *Id.* The same account predicted that "[r]edrawing 24 of the 54 mostly black legislative districts would almost certainly lead to a reduction in the number of black members of the Legislature." *Id.* By the time it adjourned, the general assembly passed new plans deconstructing 14 formerly majority black house districts and several formerly black senate districts. HB 7 EX, August 22, 1995; SB 3 EX, August 21, 1995. These plans on their face violate the non-retrogression standard of Section 5. *Beer v. United States*, 425 U.S. 130, 141 (1976).[7]

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[7] Even consent decrees in Section 2 cases are now regarded by some jurisdictions as vulnerable to *Shaw/Miller* challenges. In *Wilson v. Mayor and Board of Aldermen of St. Francisville, La.*, Civ. No. 92-765-B-1 (M.D.La. June 22, 1995), for example, the

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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defendants filed a motion for relief from the judgment on the grounds that "*Miller* calls into question the constitutionality of the apportionment plan adopted by the defendants pursuant to the Consent Judgment." Motion for Relief from Judgment Pursuant to FRCP Rule 60(b), p. 2.